IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-331

TOLEDO, PEORIA & WESTERN RAILROAD,

Petitioner,

vs.

BURLINGTON NORTHERN INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Other Authorities

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INTRODUCTORY STATEMENT

Respondent, Burlington Northern, Inc., respectfully submits that the Petition for a Writ of Certiorari to the Appellate Court of Illinois, Third District, should be denied. Respondent further suggests that the Illinois courts have fully ruled on all of petitioner's contentions and that, accordingly, the alternative relief requested in the petition should also be denied.

QUESTION PRESENTED

Respondent does not agree that the questions presented are as stated by petitioner. Rather, the real and only question involved herein is whether this Court will favorably entertain a Petition for a Writ of Certiorari to the Appellate Court of Illinois to review a decision of that Court based wholly upon questions relating to Illinois tort law.

STATEMENT

Petitioner's statement of the case, which as shown below is in part inaccurate, fails to include the salient facts which caused the Illinois reviewing courts to reverse the judgment of the trial court. For a complete portrayal of such facts as those courts saw them—and as they really are—see App. 1, pp. 4a-21a.

On page 5 of the petition, petitioner notes that "the jury was instructed by the court in accordance with instructions tendered by defendant on the substantive issues", as if to imply that respondent cannot be heard to argue that the case should not even have gone to the jury. Under Illinois law, however, where, as here, a party has unsuccessfully moved for directed verdicts prior to the trial court's instructions to the jury, that party's tendering instructions to the court does not amount to a waiver of claims that the case should not have gone to the jury in the first place. *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 468, 58 N.E. 367 (1900).

On page 6 (as well as on page 3), petitioner states that "[t]he Appellate Court found no error by the trial court in the conduct of the trial. . . ." That is not correct. The Illinois Appellate Court reached only those issues it deemed necessary for its decision (See pet., app. 2, p. 9a). The court simply did not discuss, and accordingly made no rulings on, other claims of error made by respondent on the trial court's conduction of the trial.

On page 7, petitioner claims that the Illinois Supreme Court "refused" to rule on petitioner's request for appeal to that court as a matter of right. That, again, is not correct. On May 31, 1979, the Illinois Supreme Court in one order denied TP&W's petition for review (pet., app. 5, p. 50a). Under Illinois Supreme Court Rule 317, where petitions for leave to appeal and for appeal as a matter of right are combined, they will be disposed of in one order (pet., app. 3). The Illinois Supreme Court deemed its May 31, 1979, order so dispositive, and indeed the clerk of that court advised petitioner of that fact in writing (See App. 2, p. 68a).

SUMMARY OF ARGUMENT

No constitutional issue or question under federal law is presented by this application nor is any other ground asserted which would warrant review by this Court on certiorari. The petition merely sets forth in detail petitioner's dissatisfaction with the action of the Illinois reviewing courts and seeks yet another review of the law and evidence upon which those courts based their determinations. No broad or general issue of federal law is presented (see *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79, 75 Sup.Ct. 614, 620 (1955)); the sole question is whether, on the facts of this case, and under state law, the Illinois Appellate Court properly reversed the trial court's judgment. That is not a question which calls for plenary action by this Court.

This is not a case where respondent is sued as a manufacturer of an alleged "defective" product. Rather, the case involves an attack by petitioner on respondent's ordinary maintenance and repair activities, which activities were accomplished in full accord with rules promulgated by the Association of American Railroads, to which both parties to his litigation were signatories.

Concerning count II of the petitioner's complaint, which sounds in negligence, the Illinois Appellate Court found that, as a matter of law and in full accord with precedent announced by the Illinois Supreme Court, respondent had not been negligent in retaining the solid bearing design configuration on car CB&Q182544 in February, 1969. That design was one of long standing use in the railroad industry, was incorporated into 85% of *petitioner's* rolling stock, and had been approved by the Association of American Railroads for use in interchange service. Petitioner had agreed to be bound by

those rules, had had an opportunity to vote thereon, and its owners, two large railroads, had helped promulgate them. Under those circumstances, among others, petitioner was simply not in a position, under Illinois tort law, to attack the solid bearing design in this litigation.

As for count I of the complaint, the strict liability count, the appellate court wisely held that the bearing design in question, whose operating characteristics were fully known to petitioner, was as a matter of law simply not "unreasonably dangerous" to petitioner. In reaching that conclusion, the appellate court adhered fully to principles of Illinois strict liability law previously established by the Illinois Supreme Court. Furthermore, even if the bearing design could have been deemed "unreasonably dangerous" to petitioner, the facts of the case established conclusively that it had, as a matter of law, assumed the design risk of use of those bearings in any event.

The appellate court, having first found for respondent on count I as a matter of law *assuming* doctrinal application of strict liability, further observed that the strict liability theory probably didn't apply in this litigation in any event. In so stating, the court noted the vast difference between (1) the interchange of railroad cars among railroads, where care and maintenance responsibilities have long been placed primarily on receiving railroads, and (2) the general distribution of products to users and consumers in the market place, where strict liability was meant to apply. The court was on sound ground in making that comment and simply followed a ruling on the point by the United States Court of Appeals for the Ninth Circuit applying Arizona law. *Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900, 902 (9th Cir. 1978).

ARGUMENT

THE ILLINOIS COURTS DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS; INDEED, THERE ARE NO FEDERAL CONSTITUTIONAL QUESTIONS HERE PRESENTED.

Petitioner, recognizing (pet. p. 20) but then seemingly ignoring that the Seventh Amendment to the U.S. Constitution has no application to civil proceedings in state courts (*St. Louis & K.C. Land Co. v. Kansas City*, 241 U.S. 419, 36 Sup.Ct. 647 (1916); *Sharpe v. State*, 448 P.2d 301 (Okla. 1968), *cert. den.* 394 U.S. 904, 89 Sup.Ct. 1011 (1969))*, seeks nonetheless to in effect render it applicable to this case through Amendment XIV to the U.S. Constitution. That, however, has never been done. *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 36 Sup.Ct. 595 (1916); *Wartman v. Branch 7, Civ. D., Cty. Ct., Milwaukee Cty., Wis.*, 510 F.2d 130, 134 (7th Cir. 1975); *Iacaponi v. New Amsterdam Casualty Company*, 258 F.Supp. 880, 884 (W.D. Pa. 1966), *aff'd* 379 F.Supp. 311 (3d Cir. 1967), *cert. den.* 389 U.S. 1054, 88 Sup.Ct. 802 (1968). See also *Palko v. Connecticut*, 302 U.S. 319, 325, 58 Sup.Ct. 149, 152 (1937). Moreover, even if petitioner's "incorporation" suggestions (which are made in this Court in this litigation for the first time) were viable, its position in this case is devoid of factual foundation.

As shown by the Illinois Appellate Court's opinion (pet. app. 2), that court based its reversal of the trial

* *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 64 Sup.Ct. 409 (1944), cited and quoted from extensively by petitioner, involved proceedings arising under federal law and occurring exclusively in federal courts.

court's judgment on, *inter alia*, its finding that the bearing design of car CB&Q182544 did not, as a matter of law, create a condition unreasonably dangerous to petitioner, "and on the basis of the undisputed facts in the record, it was error to submit the case to the jury." (pet. app. 2, p. 12a) From that holding, the appellate court further concluded that "[t]here was no basis for a finding of negligence since the bearing was not physically defective and the design was not unreasonably dangerous but was customarily used within the industry." (pet. app. 2, p. 13a) Thus, it is clear from the plain language of the appellate court's opinion that it held, in accordance with standards enunciated by the Illinois Supreme Court in *Pedrick v. Peoria & Eastern Railroad Co.*, 37 Ill.2d 494, 510, 229 N.E.2d 504, 513-14 (1967), that all of the evidence, when viewed in its aspects most favorable to petitioner, so overwhelmingly favored respondent that no contrary verdict based on that evidence could ever stand. Accordingly, the appellate court did not, as asserted by petitioner, improperly "sweep . . . aside two jury verdicts and the special findings consistent therewith and substitut[e] its view of the evidence instead." Rather, the appellate court held that the trial court had erred in denying respondent's motions for directed verdict, in full accord with rules competently announced by the Illinois Supreme Court.*

* Because the state appellate court *applied* the *Pedrick* standard, its failure to perfunctorily cite that case is of no significant moment, and the Illinois Supreme Court, by its denial of the petition for review filed in that court, so found. Use of the *Pedrick* standard was of course urged upon the appellate court by respondent.

A. The Illinois Appellate Court Competently And Correctly Held That The Evidence, As A Matter Of Law, Failed To Support A Verdict That Defendant Was Negligent.

On pages 9-10 of the petition, petitioner asserts that a number of facts and legal conclusions have been "established" when the evidence is viewed in its aspects most favorable to petitioner. While petitioner has taken license in its characterization of many of those "facts" and conclusions, and has selectively ignored others, some of the more exaggerated statements are worthy of comment. In paragraph (2), petitioner states that "[i]n 1969. and for years prior thereto, journal roller bearings were available which *greatly* reduced the possibility of a journal bearing failure on freight cars." (emphasis added.) The abstract references cited by petitioner fail to support the assertion. In paragraph (3), petitioner states that "Burlington's own assistant shop superintendent suggested to his superintendent that roller bearings be installed on the car." That is simply incorrect. The witness made that comment in 1971 or 1972 (A. 375, 530)* and the repair of the car in question occurred in 1969. The matter is completely divorced from the issues in this case. In paragraph (9), petitioner asserts that "plaintiff was free from contributory negligence." While the jury indeed made that finding, respondent contested it on appeal under *Pedrick* standards and no reviewing court has ever ruled on that contention.** In paragraph

* "A." refers to Abstract of Record.

** If petitioner *was* free from contributory negligence which was a proximate cause of the derailment it could have no indemnity from respondent in any event, having paid third party claimants under no compulsion and without any notice to respondent. Stated differently, if petitioner was without fault, it was not liable to the third party claimants in the first place and is accordingly in no position to pursue an indemnity

(Footnote continued on following page)

(10), petitioner concludes that "[t]he failure to equip the car with roller bearings was a proximate cause of the accident." Again, respondent has continuously argued on appeal that, as a matter of law, proximate cause or cause in fact had not been established by petitioner, and again, no appellate court has ever ruled on that contention (see App. 1, pp. 22a, 64a-65a).

Further, while petitioner repeatedly cites and invokes the *Pedrick* case, it nevertheless invites this Court (as it invited the Illinois Supreme Court) to consider only a selected portion of all of the evidence. That such a consideration does not meet the *Pedrick* standard is obvious from a reading of that opinion. 37 Ill.2d 494, 504-05, 229 N.E.2d 504, 510.

Among the established facts omitted by petitioner in its recitations are the following, each of which stands uncontroverted: during the year 1971, two years *after* the 1969 repairs involved in this litigation, reports submitted to AAR were showing ". . . increased hotbox set outs involving roller bearings . . ." (BE 41)*; both solid bearings and roller bearings are equally as likely to suffer damage (and resultant failure) from longitudinal impacts which may occur during rough handling (A. 590); damage done to solid bearing components, however, is more readily detectable on inspection (A. 590-91, 613); both petitioner and respondent agreed to be bound by

footnote continued

claim. Restatement of Torts (2d) § 521 (1977); *Alabama Great Southern R. Co. v. Allied Chemical Corp.*, 501 F.2d 94 (5th Cir. 1974), *aff'd en banc* 509 F.2d 539 (5th Cir. 1975); *Shulman v. Chrysler Corporation*, 31 Ill.App.2d 168, 175 N.E.2d 590 (1st Dist., 1961). Respondent raised this point continuously in the Illinois courts, but the reviewing court did not deem it necessary to reach the issue.

* "BE" refers to Book of Exhibits.

the AAR Interchange Rules prior to the accident (App. 1, pp. 4a-5a), including those rules governing the kinds of journal bearings acceptable on various kinds of cars and the rule requiring member railroads to inspect, lubricate, and be responsible for the condition of all cars on their lines; by retaining the solid bearing design on car CB&Q182544 in its 1969 repairs of that car, respondent fully complied with the interchange rules to which petitioner and respondent had agreed (A. 434); petitioner had intimate knowledge concerning the operation and propensities of journal bearings on freight cars (A. 551-59); at the time of the derailment in question, it owned a total of 640 cars, only 90 of which were equipped with roller bearings (A. 300); it knew the bearings on car CB&Q182544 were solid bearings when it accepted the car in interchange (A. 338); based in part on a trip before the accident, petitioner's management determined that a hotbox detector (See App. 1, pp. 17a-18a) should be located at a point approximately one-half mile from where the hotbox resulting in the accident was first observed (A. 557), which detector would have detected the hotbox in question (A. 623-24); and finally, not only did petitioner voluntarily agree to abide by the AAR rules permitting retention of solid bearings on the category of cars to which car CB&Q182544 belonged, but also it was a voting member of the AAR when such rules were adopted and its co-owners had been on the committee which developed the rules (see App. 1, p. 8a).

Clearly, what constitutes negligence or the lack of it as a matter of law is purely a matter of local law. Federal courts uniformly accept determinations thereon made by the state courts. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 Sup.Ct. 817, 822 (1938).

In ruling as it did on the negligence count the appellate court recognized that if a design is not unreasonably dangerous or "defective" as respects a plaintiff for purposes of strict liability, a defendant's use of that design respecting the same plaintiff cannot be a breach of duty to use reasonable care for purposes of negligence. Significantly, courts of a number of jurisdictions have expressly held that if the design of a product is not unreasonably dangerous for purposes of strict liability its use cannot constitute negligence. *E.g.*, *Halvorson v. American Hoist & Derrick Co.*, 307 Minn. 48, 240 N.W.2d 303, 307 (1976); *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934, 937, 939 (1977); *Masi v. R.A. Jones Co.*, 163 N.J.Super. 292, 394 A.2d 888, 890-91 (1978); *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 159 (8th Cir. 1978), *cert. den.* 99 S.Ct. 187.

B. The Appellate Court Competently And Correctly Ruled As A Matter Of Law That The Solid Bearing Design Cannot Be Deemed "Unreasonably Dangerous" As Between Railroads, The Only Users Of Railroad Cars.

The only alleged "unreasonably dangerous" condition in car CB&Q182544 involved in this case was one of design, *viz.*, that the car was equipped with solid bearings rather than with roller bearings (A. 165). (No physical manufacturing defect is involved.) The evidence established, however, that continued use in 1969 of a solid bearing design rather than a roller bearing design on repaired 70 ton covered hopper cars cannot, of itself, result in an unreasonably dangerous condition for purposes of strict liability in litigation between railroads.

Section 402A of the Restatement (2nd) of Torts imposes liability on the seller of a product if such

product is "in a defective condition unreasonably dangerous to the user . . . ." Section 402A states the law of Illinois. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The Restatement explicitly provides that a product cannot be considered unreasonably dangerous to the user when the risk-posing condition is fully contemplated by the user. *Restatement of Torts (2d)*, § 402A, comment i.

Comment g under § 402A, quoted by the appellate court below, provides:

> "The rule stated in this Section applies *only* where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." (Emphasis supplied)

The Illinois Supreme Court recently utilized the Restatement's rationale of "unreasonably dangerous" in *Hunt v. Blasius*, 23 Ill.Dec. 574, 384 N.E.2d 368, 372 (1978). In *Hunt*, that Court said in ruling a sign post not unreasonably dangerous as a matter of law:

> "A manufacturer is not under a duty in strict liability to design a product which is totally incapable of injuring those who foreseeably come in contact with the product. Products liability does not make the manufacturer an insurer of all foreseeable accidents which involve its product. Virtually any product is capable of producing injury when put to certain uses or misuses . . . Injuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious [or well known] to all who come in contact with the product. (*Genaust v. Illinois Power Co.*, (1976), 62 Ill.2d 456, 467, 343 N.E.2d 465.) The injuries must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an *unreasonable* risk of harm. The Restatement (Second) of Torts concludes that strict liability applies only when the product is 'dangerous to an extent *beyond* that which would be contemplated by the ordinary [person] . . . , with the ordinary knowledge common to the community as to its characteristics.' (Emphasis added.) Restatement (Second) of Torts, sec. 402A, comment i (1965)." Accord, I.P.I.2d, 1977 Supplement, at page 10.

The highest Illinois court further observed in *Hunt* as follows:

> "In the case at bar, plaintiffs have alleged no legally cognizable defect in the sign post. They have merely indicated a preference for 'break-away' posts. However valid that preference might be, the availability of an alternative design does not translate into a legal duty in products liability. An action is not maintainable in products liability merely because the design used was not the safest possible." 384 N.E.2d at page 372.

Evidence at trial established conclusively that petitioner was fully aware of the characteristics of the solid bearing design insofar as hotboxes are concerned. Several of its employees testified that hotboxes in rolling stock were not uncommon (A. 192, 203-04), and that its rules required its operating employees to be constantly alert for them. Moreover, petitioner introduced a list of 159 solid bearing hotboxes covering a period of 5 years from 1965-70 (Pl. Ex. 90; BE 11). Thus, petitioner was fully aware of the risk here involved in the use of cars with solid bearings. Indeed, prior to the Crescent City derailment, it was actively considering the installation of automatic surveillance devices to more readily detect its hotbox occurrences (A. 552-59).

Under facts showing far less knowledge on the part of railroads of a claimed "unreasonably dangerous" condition than that proven here, the United States Court of

Appeals for the Eighth Circuit held that such a condition had not been established. *St. Louis-S.F. Ry. Co. v. Armco Steel Corp.*, 490 F.2d 367 (8th Cir. 1974), *affirming* 359 F.Supp. 760 (E.D. Mo. 1973), *cert. den.* 417 U.S. 969 (1974). *Armco Steel* arose out of the derailment of one of the plaintiff's (Frisco's) trains which resulted in a loss of $745,000.00. The derailment was caused by the failure of a wheel, apparently because of fatigue cracks, manufactured and sold by Armco to Pullman. Pullman, in turn, mounted the wheel on a railroad car and sold the car to Trailer Train Company. That corporation leased the car to various railroads, including Frisco.

Frisco based its action against Armco and Pullman (a steel company and a commercial car manufacturer—not another railroad party to the AAR interchange rules) on strict liability. The courts concluded, however, that the plaintiff was not entitled to recover because the wheel was not sold by Armco in a "defective condition unreasonably dangerous to the user or consumer . . . ." in that the plaintiff had fully contemplated all the characteristics of the wheel.

Since the only claim of petitioner in this case concerns a design matter; *viz*, using solid bearings on CB&Q 182544 instead of roller bearings (A. 165-70), and no physical manufacturing flaw is in issue (A. 492), the rationale of *Armco Steel* is even more compelling here. In *Armco Steel*, the trial court found that the wheel met AAR specifications, to which the plaintiff had agreed to be bound. Similarly, there was no evidence in this case showing that the bearing or journal box components here involved were in any manner defective in a physical or manufacturing sense, and plaintiff's only expert explicitly eschewed such a claim (A. 492). Petitioner, like the Frisco, is a company which has

affirmatively bound itself to AAR rules and specifications and has agreed with other railroad owners of freight cars to allow the solid bearing design to be used in interchange service.

To have sustained petitioner's strict liability verdict in this case would have been, as noted in *Armco Steel* and by the appellate court below, to "go beyond the doctrine of strict liability and [to] hold that [respondent] is an insurer and, thus, responsible in damages to a railway company whenever one of its [solid bearings] fails."*

The design cases cited in support of petitioner's position on "unreasonably dangerous" on pp. 12-14 of its petition are inapposite. In none of those cases was the plaintiff a sophisticated corporation with intimate knowledge of the characteristics of such designs or the care, inspection, and surveillance they needed. In none of those cases was an existing design used throughout an industry simply retained on a machine repaired by its owner-user, *pursuant to agreement of all parties to the litigation.* Petitioner's cases, including *Rucker v. Norfolk & Western Ry.*, 64 Ill.App.3d 770, 381 N.E.2d 715 (5th Dist. 1978),** rather than supporting its position here,

* That *Armco Steel* involved a reviewing court's determination that a trial court's findings were not clearly erroneous is not sufficient to distinguish that case from the present one, for there is *no* evidence in this record from which one may properly conclude that the TP&W was (1) not aware that CB&Q182544 was equipped with solid bearings, (2) unaware of not uncommon occurrences of hotboxes in solid bearing rolling stock (indeed, it says it was constantly on the alert for them), and (3) not a party to rules which specifically approved the use of such bearings on cars such as CB&Q182544. The facts of the present case are *much* stronger than those in *Armco Steel* with respect to the absence of the requisite unreasonably dangerous condition, and the Illinois Appellate Court so ruled.

** *Rucker* is presently argued and under advisement on appeal to the Illinois Supreme Court, Docket Nos. 51315, 51335 Cons.

simply typify situations in which the strict tort doctrine may call for liability. In *Rucker*, for example, the defendant GATX was sued in its capacity as a commercial tank car manufacturer, not as an operating railroad which had merely repaired its car pursuant to an agreement with a plaintiff railroad that the design attacked by the latter could be retained in railroad service. Further, the plaintiff in *Rucker* was a personal representative of a deceased railroader, not a plaintiff railroad which not only agreed to the use of the design it attacks but also which had the opportunity to vote on whether such design was appropriate for interchange service.

Suggestions by plaintiff that defendant retained the use of "obsolete" equipment in 1969 are belied by the fact that there were over 1,000,000 solid bearing railroad cars in use in 1971 by the American railroad industry, more than a year after the subject accident, and that design was still being used at the time of trial. Of the 640 cars owned by *petitioner* in 1970, 85% were of the solid bearing design (A. 300). Further, notwithstanding petitioner's assertions (pet. p. 9), there was no evidence that any railroad in a repair program such as the one before this Court* had ever converted its cars from solid bearings to roller bearings (App. 1, p. 23a).

* The jury's special finding to the contrary notwithstanding, car CB&Q182544 was not "rebuilt" in 1969 as that term of art is used in the railroad industry. Under the industry definition contained in Rule 112 of the AAR rules (Def. Ex. 8, Rule 112, Sec. F.5, a car is not "rebuilt" unless repair costs exceed 50% of the car's reproduction cost and unless certain specified items are repaired or replaced. Petitioner made no attempt to prove a rebuilding under Rule 112, and respondent established that the 1969 repairs did not even come close to 50% of reproduction cost. (The reproduction cost was $7,212.33, and the approximate cost of the 1969 repairs was $1,733.15 (A. 531; Def. group ex. 27, p. 9)).

Plaintiff states (pet. p. 13), that ". . . the evidence showed that the use of an alternative design (roller bearings) would significantly reduce hotbox occurrences *from all causes.*" (emphasis added.) That is not correct. Dr. Rhine, one of respondent's experts, testified without contradiction that roller bearings are just as likely to suffer damage (and resultant failure) from longitudinal impacts (which occur during rough handling) as solid bearings (A. 590). Damage done to solid bearing components is, however, more easily detectable on inspection (A. 590-91; 613). See pl.'s ex. 151 (BE 14), where an AAR committee report notes "with alarm" the number of unaccounted for *roller bearing* hotbox failures (pl. ex. 151, p. 2), and the testimony that roller bearings were themselves undergoing an evolution in design to reach acceptable reliability (A. 612). In fact, petitioner's worst hotbox incident prior to Crescent City involved a roller bearing (A. 556).

Petitioner contends (pet. p. 14) that this Court should now consider the "unidentified defect" holding in *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570, 357 N.E.2d 449 (1976), as a legal theory in support of the jury's verdict, even though the jury was never instructed on that theory due to its rejection by the trial court as without record basis (A. 703-710). Petitioner cites no decisional law that an appellate tribunal may affirm a judgment founded on a jury verdict on the basis of a theory of recovery never before that jury. Nor does it exist. A party may defend a judgment on review on a legal theory not relied on (or allowed to be relied on) at trial only where that theory involves a question solely of *law* rather than additional determinations of *fact. UFITEC, S.A. v. Carter*, 20 Cal.3d 238, 571 P.2d 990 (1977); *see also, People ex rel. Sterba v. Blaser*, 33 Ill.App.3d 1, 337 N.E.2d 410, 416 (1st Dist. 1975). Here, a judgment on

the jury verdict could be sustained on the basis of *Tweedy* only if it had been properly determined as a matter of *fact* by the jury that car CB&Q182544 possessed in February, 1969, an unidentified defect attributable to respondent which caused the hotbox of June 21, 1970. That matter, however, was not before the jury. See *Nelson v. Union Wire Rope Corporation*, 31 Ill.2d 69, 199 N.E.2d 769, 792 (1964).

Tweedy is inapplicable in any event. While Dr. Rhine testified that the "expected life" for solid bearings might be roughly up to 1.5 million miles, his view was based upon an assumption of adequate care, inspection, and maintenance (A. 594, 597). Plaintiff adduced no evidence on handling of car CB&Q182544 while it was in the hands of some 20 different railroads (including eleven times with plaintiff (Pl. Ex. 40)) during the period between February, 1969, and June 18, 1970, wholly aside from its further failures to account for the car while in the hands of the P&PU and to adequately negate its own abnormal use of the car as a cause of the hotbox in question.*

* On page 14 of the petition, it is implied that car CB&Q182544 was somehow substandard because it sustained five broken springs and three broken bearings between its 1969 repairs and the Crescent City accident. No such implication may be made, for although solid bearings can last for 1.5 million miles, that assumes proper handling, maintenance, and inspection (A. 597). There was simply *no* evidence as to handling of the car during its use by some twenty railroads during the period February, 1969, through June 18, 1970. Untold (as well as unknown) impacts and stresses causing that damage may have occurred during that period. As a matter of fact, the existence of *broken* springs and *broken* (not overheated) bearings suggests that there had been impact and stress. Under the evidence, there can be no inference that car CB&Q182544 somehow had physically "defective" bearing assemblies in February, 1969 (See *Erzrumly v. Dominick's Finer Foods, Inc.*, 50 Ill.App.3d 359, 365 N.E.2d 684, 687-88

(Footnote continued on following page)

C. The Illinois Courts Correctly Ruled That Petitioner Assumed The Risk As A Matter Of Law.

Petitioner argues that the Illinois Appellate Court failed to adhere to the *Pedrick* standard in ruling in favor of respondent on assumption of risk because of the existence of only "ample" evidence in support of petitioner's complete knowledge of the alleged risk-posing condition. While the appellate court's "ample evidence" language was used in connection with "unreasonably dangerous" (pet. app. 2, p. 10a) and not, as asserted by petitioner, on assumption of risk, it is clear that the court, given the record before it, could just as properly have utilized the term "uncontradicted", "overwhelming", or "undisputed".

It was established beyond doubt that petitioner accepted car CB&Q182544 in interchange, *after inspection*, with full knowledge that the car was equipped with solid bearings. Petitioner has never challenged that position. Thus, notwithstanding its knowledge that the car in question was equipped with solid bearings, which petitioner charges was an unreasonably dangerous design *per se*, and despite its knowledge that such design was on occasion subject to hotboxes, plaintiff accepted the car in interchange and proceeded to use (indeed, misuse) it in railroad service.* On interchange

footnote continued
(1st Dist. 1977), a matter readily conceded by petitioner's own expert when he assumed the prior bearing and spring repairs (A. 456) and then admitted that he took no issue with car CB&Q182544's L-4 bearing assembly in any physical or manufacturing sense (A. 492).

* The strange contradiction between petitioner's litigation position on this bearing design and its continuous ownership and tender in interchange of cars similarly equipped down to the day of trial has not been revealed in this court nor ever addressed by petitioner.

acceptance, petitioner's witness Danahy of the AAR testified that the prerogative of accepting or rejecting a car rests with the receiving railroad (A. 446, 450-51).

Assumption of risk was established in Illinois as a defense to strict liability claims in *Williams v. Brown Manufacturing Company*, 45 Ill.2d 418, 426, 261 N.E.2d 305, 309 (1970). In stating that assumption of risk was "ordinarily a question to be determined by the jury" (261 N.E.2d at 312), that court recognized that on occasion the matter could become a question of law. And since the decision in *Williams*, a number of Illinois courts have indeed held in products cases that plaintiffs have assumed risks as a matter of law. *E.g.*, *Denton v. Bachtold Bros., Inc.*, 8 Ill.App.3d 1038, 291 N.E.2d 229 (4th Dist. 1972); *Ralston v. Illinois Power Co.*, 13 Ill. App.3d 95, 299 N.E.2d 497 (4th Dist. 1973); *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973), *cert. den.* 415 U.S. 932 (1974); *Fore v. Vermeer Manufacturing Co.*, 7 Ill.App.3d 346, 287 N.E.2d 526 (3d Dist. 1972).

Petitioner is not an unsophisticated or inexperienced consumer. Rather, it is an entity which necessarily has particular knowledge and understanding of railroad cars.* It not only maintained repair tracks (A. 545, 563), but also employed personnel who could repair solid bearing cars as well as repair *and install* roller bearings

* The importance of taking into consideration a plaintiff's age, experience, knowledge and understanding in connection with an assumption of risk defense was recently emphasized in *Troszynski v. Commonwealth Edison Co.*, 42 Ill.App.3d 925, 356 N.E.2d 926 (1st Dist. 1976), where it was shown that the plaintiff lacked experience with and knowledge of the danger of an electrical meterbox. Plaintiff's relative unsophistication was also stressed in *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill.2d. 64, 264 N.E.2d 170 (1970), where the Illinois Supreme Court refused to hold that a plaintiff had assumed a risk as a matter of law.

(A. 563). It would ill befit petitioner to argue that it knew nothing about solid bearings and related components, as well as their proclivities. Indeed it has made no such contention, and TP&W personnel testified extensively on petitioner's intimate knowledge of solid bearing rolling stock, hotboxes, hotbox detection devices, etc. (see, *e.g.*, A. 552-59).

Petitioner discusses cases which purportedly hold that a plaintiff does not assume a risk when he vaguely recognizes a "general possibility" of danger. Of the two Illinois decisions cited (pet. p. 16), *Christopherson v. Hyster Co.*, 58 Ill.App.3d 791, 374 N.E.2d 858 (1st Dist. 1978) did not deal with assumption of risk and was decided under Wisconsin's comparative fault doctrine. In the other, *Karabatsos v. Spivey Co.*, 49 Ill.App.3d 317, 364 N.E.2d 319 (1st Dist. 1977), the court held that the plaintiff could have been completely unaware of the possibility of injury in doing what he did at the time of the accident (364 N.E.2d at p. 322).

Petitioner attempts (pet. p. 15) to restrict its charge of an "unreasonably dangerous" condition to the particular 1969 bearing installation on car CB&Q182544, while elsewhere, on "unreasonably dangerous", it speaks solely of "design" except as respects *Tweedy*, which is inapplicable. Plainly stated, this is a "design" case. See *Prince v. Galis Manufacturing Co.*, 58 Ill.App.3d 1056, 374 N.E.2d 1318 (3d Dist. 1978).

Petitioner argues that it was "obligated" to accept 70 ton solid bearing covered hopper cars. That is contrary to the evidence, as shown *supra*, p. 19. Even if petitioner *were* "obligated" to accept such cars, however, that was by its long standing consensual agreement (BE 89), and an obligation under an agreement is not "involuntary" in any event.

Petitioner finally asserts that even if its acceptance of solid bearing 70 ton covered hopper cars was "voluntary", it was nonetheless not "unreasonable".* However, if car CB&Q182544 was "unreasonably" dangerous in February, 1969 simply because it was equipped with solid bearings (which, again, constitutes petitioner's entire case), petitioner knew that it was so equipped and also knew of the hotbox "hazard" involved. A party who accepts and uses an "unreasonably" dangerous instrumentality, knowing of the "unreasonable" danger, acts "unreasonably" in proceeding with its use. *Fore v. Vermeer Manufacturing Co.*, 7 Ill.App.3d 346, 287 N.E.2d at p. 528.

D. The Authorities Cited By The Illinois Appellate Court, Under Illinois Law, Compelled A Rejection Of The Jury Verdicts.

As respects the negligence count, the appellate court cited *Watts v. Bacon & Van Buskirk Glass Co.*, 18 Ill.2d 226, 163 N.E.2d 425 (1959), for the proposition that respondent had been guilty of no negligence as to petitioner in repairing car CB&Q182544 and retaining its solid bearing design. *Watts* arose out of an accident in which a plaintiff was injured by shattering glass in the door of a drug store. The glass was plate glass, which was shown to be more susceptible to breakage than tempered glass, which was available.

* In Illinois, voluntary and knowing use of an unreasonably dangerous item is sufficient for a showing of assumption of risk, without any further showing that such use was also "unreasonable". Thus, in *Sweeney v. Max A.R. Matthews & Co.*, 46 Ill.2d 64, 66, 264 N.E.2d 170, 171 (1970), the Illinois Supreme Court said that to establish assumption of risk, the defendant must show that "the plaintiff knew the product was in a dangerous condition and proceeded to use the product in disregard of this known danger." See also the new Illinois pattern instruction on assumption of risk, where the term "unreasonable" is notably absent. I.P.I.2d 400.03 (1977 Supplement).

The Illinois Supreme Court affirmed a directed verdict for the glass supplier. Thus, under *Watts*, even if roller bearings were less susceptible to hotboxes than solid bearings, respondent was nonetheless under no duty to petitioner to change bearing designs during the February 1969 repairs.* As in *Watts*, (18 Ill.2d at 232), there has been no evidence here that the particular solid bearings on CB&Q182544 were inherently dangerous, defective, or unreasonably dangerous in any physical sense (A. 492).** Furthermore, the evidence shows that the solid bearing design was in substantial use in 1969 and at the time of trial (A. 288-89). See *Day v. Barber-Colman Co.*, 10 Ill.App.2d 494, 508, 135 N.E.2d 231, 238 (2d Dist. 1956).

With respect to the strict liability count, the appellate court relied in significant part on *St. Louis S.F. R.R. v. Armco Steel Co.*, 490 F.2d 367 (8th Cir. 1974) for the proposition that the solid bearing design cannot be

* In this connection, the *Watts* Court notes that the plate glass there in question had been chosen by the defendant's customer. In the present case, it may fairly be said that solid bearings were chosen and approved by both petitioner and respondent under the Interchange Rules—rules on which petitioner had presumably voted, rules which petitioner's owners helped promulgate, and rules by which petitioner had agreed to be bound. Where a product is properly manufactured pursuant to plans and specifications provided and agreed to by the customer and such plans and specifications are not so obviously dangerous that they could not be reasonably followed, liability for a claimed design "defect" does not obtain. *Hunt v. Blasius*, 23 Ill.Dec. 574, 384 N.E.2d 368 (1978); *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir. 1973); *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 376 A.2d 88, 90 (Del.Supr. 1977); Restatement (2d) of Torts, Sec. 404, comment (a).

** Moreover, in his 25 years of railroading experience, respondent's claims administrator knew of no instances of personal injury on his railroads from hotboxes or failed journal occurrences (A. 568). Petitioner's prior experience was similar (A. 302).

deemed unreasonably dangerous to a plaintiff railroad. As shown in Section B of this argument, the facts of *Armco* were substantially weaker in favor of the defendant than are those in the present case. Its rationale, which is totally consistent with the concept of unreasonably dangerous as envisaged by § 402A of the Restatement of Torts (2d), and thus, the law of Illinois, is *a fortiori* applicable here in favor of a finding of no unreasonably dangerous condition as respects railroads, the only users of railroad cars, as a matter of law.

The appellate court also cited *Torres v. Southern Pacific Transporation Co.*, 584 F.2d 900 (9th Cir. 1978), a case standing, *inter alia*, for the proposition that "the highly specialized industry-use interchange program to be found in this case is too dissimilar to the commercial distribution of a product to warrant the [strict tort liability] doctrine's application." The *Torres* court found that to be the law even if Arizona courts would apply strict liability generally to commercial lessors. Resolution of that question was deemed unimportant to the court's determination (584 F.2d at 902). While respondent believes that *Torres* is correct, and that strict liability ought not apply in this case (see Section E., *infra*), even if the strict liability doctrine does apply here, plaintiff as a matter of state law completely failed to prove a case thereunder and, furthermore, assumed the risk of the claimed unreasonably dangerous condition in any event.

E. The Illinois Appellate Court's Opinion Does Not Offend Constitutional Guarantees Of Due Process Or Equal Protection Of The Law; Under The Facts Here Present, Strict Liability Simply Does Not Apply.

Petitioner in essence contends that the appellate court's comment that strict liability should not apply in

litigation between two railroads as respects the interchange of rolling stock violates constitutional principles of due process and equal protection of the law.* While, as shown in Sections B. and C., *supra*, the appellate court correctly ruled for respondent *assuming* doctrinal application of strict liability, petitioner's constitutional contentions are of no merit in any event.

Respondent has contended from the inception of this litigation that the strict liability doctrine has no application here. It can hardly offend the Constitution for a court to rule that the interchange of railroad cars is so vastly different from the commercial distribution of products as to warrant exclusion of the application of strict liability in actions between railroads concerning the interchange of such rolling stock. Different facts and circumstances ofttimes call for different rules of law. See, e.g., *Immergluck v. Ridgeview House, Inc.*, 53 Ill.App.3d 472, 368 N.E.2d 803 (1st Dist. 1977). The question presented is one of the validity of the judgment under state law—not a question of constitutional magnitude. *Beck v. Washington*, 369 U.S. 541, 554-55, 82 Sup.Ct. 955, 962-63 (1962); *Maupin v. Maupin*, 403 Ill. 316, 319, 86 N.E.2d 206 (1949); *Merlo v. Public Service Co.*, 381 Ill. 300, 309, 45 N.E.2d 665 (1943); see also

* In light of the substantive rulings on Illinois strict liability made by the appellate court, it is questionable whether its reference to *Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900 (9th Cir. 1978) even constitutes a holding that the strict liability doctrine does not here apply. Indeed, petitioner itself does not characterize the appellate court's *Torres* language as a "holding" (See pet. p. 6). In any event, however, where a state tribunal's ruling is based upon independent and adequate state grounds, this Court will assiduously avoid a review reaching constitutional questions. *Herb v. Pitcairn*, 324 U.S. 117, 125, 65 Sup.Ct. 459, 463 (1945); *Fox Film Corporation v. Muller*, 296 U.S. 207, 210, 56 Sup.Ct. 183, 184 (1935).

Fulford v. O'Connor, 3 Ill.2d 490, 497, 121 N.E.2d 767 (1954).

It is seen from the first case to apply strict liability to products generally, *Greenman v. Yuba Power Products*, 59 Cal.2d 67, 27 Cal.Rptr. 697, 377 P.2d 897 (1963), that a substantial policy premise justifying the doctrine's use is that manufacturers and others in the original chain of distribution of products know, or should know, that articles placed by them in the stream of consumer commerce will be used or consumed without inspection by entities or people who, lacking expertise, cannot be expected to ascertain the existence of defects (27 Cal.Rptr. at pp. 700, 701). For principally that reason, courts have held that liability for injury caused by products, if they are unreasonably dangerous, should rest with those best able to assure the absence of defects therein; namely, those within the chains of distribution involved. (See Anno., *Products Liability: Strict Liability in Tort*, 13 ALR3d 1057). Thus, Section 402A of the Restatement of Torts (2d), which the Illinois Supreme Court adopted in *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965), contemplates a *special* liability to be imposed upon a "seller" of a product for physical harm caused a user or consumer by unreasonably dangerous product conditions.

Rule 1 (A. 26) of the Association of American Railroads' *Interchange Rules* (Def. Ex. 8) places a legal duty of inspection and maintenance on receiving railroads. That rule reads:

"Care of Foreign Freight Cars"

"Rule 1. (a) Each railroad is responsible for the condition of all cars on its line, and must give to all equal care as to inspection and lubrication."

For cases which deal with such duty, see *Alabama Great Southern R. Co. v. Allied Chemical Corp.*, 501 F.2d 94, 99, fn. 3 (5th Cir. 1974), *aff'd en banc*, 509 F.2d 539 (5th Cir. 1975); *Chicago & Northwestern Ry. Co. v. Chicago, R.I. & P.R. Co.*, 179 F.Supp. 33 (N.D. Ia. 1959), *aff'd* 280 F.2d 110 (8th Cir. 1960), *cert. den.* 364 U.S. 931 (1961); *Galveston, H. & S.A. Ry. Co. v. Nass*, 94 Tex. 255, 59 S.W. 870 (1900); *Rylander v. Chicago Short Line Ry. Co.*, 19 Ill.App.2d 29, 45, 153 N.E.2d 225, 232-33 (1st Dist. 1958), *aff'd* 17 Ill.2d 618, 161 N.E.2d 812 (1959).

Strict liability simply has no place in actions between railroads as to interchange of rolling stock because the receiving road is under a contractual *and common law* duty to discover and correct defects in such rolling stock. That defendant in 1969 repaired, or even "rebuilt", the car in question has no bearing on whether that position is sound, for the AAR rules require each railroad to assume the same responsibility for the soundness of *all* cars on its line, whether owned by it or not, or whether repaired or "rebuilt" by it or not, if they are accepted following an interchange inspection. See *Torres v. Southern Pacific Transporation Co.*, 584 F.2d 900, 901 (9th Cir. 1978); *Hunter v. Missouri-Kan.-Tex. R.R.*, 276 F.Supp. 936, 940-41 (N.D. Okla. 1967), *aff'd* 433 F.2d 352 (10th Cir. 1970). Application of strict liability here would precisely *reverse* that concept.

That the rationale of rule 1(a) is not only relevant, but in most cases, governing, in indemnity actions between interchanging railroads is shown by the fact that its operation typically prevents a receiving railroad which has paid damages to its injured employee from obtaining indemnity from a delivering railroad whose allegedly "defective" car had caused injury. That is so because a receiving railroad, *unlike ordinary users of*

products in the market place, is not entitled to assume that an interchanged car is in a safe condition. *Restatement, Restitution*, § 93, comment c, p. 412. Accord: *Galveston, H. &. S.A. Ry. Co. v. Nass*, 59 S.W. 870 (Tex. 1900), where it was held that the public policy of forbidding indemnity in such cases is "sternly imperative", in that a receiving railroad ". . . would [otherwise] be offered an inducement to relax it vigilance in the protection of those who are largely dependent upon it for their safety . . ." (59 S.W. at p. 871). Application of strict liability here would abrogate that rationale which, in fact, was employed by the court in one of the very cases cited by petitioner (pet. p. 26) to preclude an indemnity claim by a receiving railroad against a delivering line. *Chicago, R.I. & P.R. Ry. Co. v. C&NW*, 179 F.Supp. 33, 61 (N.D. Ia. 1959), *aff'd* 280 F.2d 110, 118 (8th Cir. 1960) *cert. den.* 364 U.S. 931 (1961) (while *contribution*, as opposed to indemnity, was allowed, that was under Iowa law, here inapplicable).

Citing *Maine Central R.R. Co. v. Bangor & Aroostook R. Co.*, ... Me. ....., 395 A.2d 1107 (1978), plaintiff implies that the Maine Supreme Court has held proper the application of strict liability as between railroads interchanging cars pursuant to the AAR Interchange Agreement and Rules. While, as shown in Appendix 1, pp. 58-60, that case doesn't even address the issue, it was decided by the Maine Supreme Court under Maine law and is thus not binding on Illinois courts in any event.

Plaintiff on page 27 of its petition cites *Missouri Pacific Railroad Co. v. Southern Pacific Co.*, 430 S.W.2d 900 (Ct.App. Tex., 1968), for the proposition that a receiving railroad may sometimes obtain indemnity (there under a negligence theory) from a delivering railroad for amounts paid by the receiving road to its employee injured as a result of defects existing in an in-

terchanged car. In that case, however, the receiving railroad, under the Safety Appliance Act, was absolutely liable to its injured employee. The court specifically found that the receiving railroad had not been guilty of actionable negligence (430 S.W.2d at pp. 903, 905). In the present case, the *only* manner in which petitioner could have been liable to third parties, for which indemnity is here sought, was as a result of its actionable negligence. *Young v. Toledo, Peoria & Western R. Co.*, 46 Ill.App.3d 167, 360 N.E.2d 978, 980 (3d Dist. 1977) (a case involving the subject derailment); *Hertz v. Chicago, Indiana & Southern R.R. Co.*, 154 Ill.App. 80, 88, 90-91 (2d Dist. 1910); Restatement of Torts (2d), § 521 (1977).

Another case plaintiff cites on this point, *Southern Cotton Oil Co. v. Atlantic Coast Line R. Co.*, 17 F.2d 411 (E.D. Va. 1927), didn't even involve an indemnity suit. The court there simply denied recovery to a car owner where there was leakage of oil from a car furnished by it *where due care had been exercised by the defendant receiving carrier in connection with prevention of the loss.* The court held only that rule 1(a) did not work absolute liability upon a receiving railroad. Liability concerning handling of rolling stock was to be determined by the law of negligence, which is perfectly compatible with the interchange rules.

In each of the cases cited by petitioner on pp. 23-24 of its petition where strict liability was applied, the relationship of the parties was that of commercial product supplier to customer or was a relationship between parties within a vertical chain of product distribution. The relationship between railroads as respects the interchange of rolling stock is radically different and is indeed *sui generis. Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900, 902 (9th Cir. 1978).

Because of the nature of the railroad interchange system wherein cars may be away from the owner's control for substantial periods of time, the delivering, or owning, railroad *must* rely upon the receiving road to strictly follow and apply the Interchange Rules in every detail. And that is what Interchange Rule 1(a) is all about. The primary duty concerning inspection, repairs, maintenance and use of interchanged cars is placed upon the handling road—the only feasible place. See *Restatement, Restitution*, § 93, comment (c).

Finally, the policy considerations underpinning strict liability do not apply to the situation where two railroads, parties to industry rules, have agreed upon what is appropriate in connection with the repair of a car's running gear. Respondent, as a railroad owner and user of rolling stock, in 1969 engaged in repairs of its own 300 covered hopper cars, of which CB&Q182544 was one. In repairing those cars, respondent complied with all rules promulgated by the AAR, to which petitioner was a signatory party. Respondent did such work as a railroad owner of its own rolling stock, *for its own use* (See *Shook v. Jacuzzi*, 129 Cal.Rptr. 496 (Cal.App. 1976)) and, because of the nature of the railroad industry, for the use of other railroads. In no way was respondent "in the business" of marketing "products" which enter the stream of commerce for the use of unsophisticated parties powerless to protect themselves. See *Avenell v. Westinghouse Electric Corp.*, 41 Ohio App.2d 150, 324 N.E.2d 583, 587-89 (1974).

CONCLUSION

In this case the state trial court allowed a jury to find respondent strictly liable in tort and guilty of negligence as respects petitioner railroad solely as a result of respondent's following, not violating, the AAR Interchange Rules, rules upon which petitioner had an opportunity to vote, rules which petitioner's owners helped promulgate, and rules to which petitioner had agreed in writing. The Illinois Appellate Court reversed that determination unanimously, correctly viewing this case as litigation beyond the limits of strict liability and negligence. The Illinois Supreme Court refused to disturb that decision. In so doing, the Illinois reviewing courts acted competently and properly, based upon their view of Illinois tort law. There are no constitutional questions presented by the instant petition which, respondent urges, should be denied.

Respectfully submitted,

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APPENDIX

1. **Answer To Petition For Appeal As A Matter Of Right Or, In The Alternative, Petition For Leave To Appeal.**
2. **Letter Dated June 7, 1979, From Clerk Of Illinois Supreme Court To Counsel For Petitioner.**

APPENDIX 1

In the
Supreme Court of Illinois

TOLEDO, PEORIA & WESTERN RAILROAD, a corporation,
Plaintiff, Petitioner (Appellee Below),

No. 51806 vs.

BURLINGTON NORTHERN INC., a corporation,
Defendant, Respondent (Appellant Below).

Petition for Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal from the Appellate Court of Illinois, Third District. There Heard on Appeal from the Circuit Court of Peoria County. Honorable Albert Pucci, Judge Presiding.

ANSWER
To Petition For Appeal As A Matter Of Right
Or, In The Alternative,
Petition For Leave To Appeal

To the Honorable Justices of the Supreme Court of Illinois:

Defendant-Respondent, Burlington Northern Inc., a corporation, in answer to the Petition for Appeal as a Matter of Right or, in the Alternative, Petition for Leave to Appeal, prays that the petition be denied.

INTRODUCTION

In a well considered opinion below, the appellate court reversed the judgment of the circuit court entered on jury verdicts in favor of plaintiff.

One reason the appellate court ruled as it did is because the trial court result was simply too extreme. It imposed on owner-users of manufactured articles a new and onerous burden of component design-change each time those articles undergo general repairs. None of the cases cited by plaintiff in either the trial court, the appellate court, or in this court, support that remarkable position.

Another reason is that the jury and courts below were asked, in effect, to completely ignore long standing agreements between sophisticated parties concerning reciprocal use of each other's property. These agreements have generally kept railroad disputes of this kind from happening. Moreover, they have largely kept such disputes, when they do happen, out of the overburdened court system for years.

This is a case which, if the appellate court hadn't intervened, would have been looked upon by rail industry personnel as a means for escaping responsibility for the consequences of haphazard operating and inspection practices conducted during and after the interchange process.

Further, the appellate court saw this as a case where subrogation claimants were charging "defect" in a design which the nominal plaintiff (the subrogor) was pervasively and routinely using in its own interchange

and in *85% of its own equipment* in the regular course of its business.

In short, this is litigation in which plaintiff seeks to reach beyond the limits of strict liability and negligence law. The appellate court correctly perceived that as the posture of plaintiff's case, and properly overturned a trial result that was wrong as a matter of law.

The observations offered above cannot be garnered from the selective facts set forth by plaintiff in its petition. To view this litigation as the appellate court saw it—and as it really is—a comprehensive statement of the facts is required. We offer it below.

STATEMENT OF FACTS

This case involves alternate designs of journal bearing components used or usable on a certain railroad freight car known as car CB&Q182544. The bearing actually used was an original design approved at the level of the Association of American Railroads (AAR), after deliberation of its technical committee, and upon vote of its members (A. 449). The alternate design, also approved by the Association, came later. To be used on equipment manufactured earlier, the alternate design had to be retrofitted in an operation requiring substantial machining and other work. This later alternate was not required by rule or regulation to be installed during a repair *or rebuilding* of this car (A. 434).

The Association Of American Railroads And The Interchange Rules

The Association of American Railroads (AAR) is a not-for-profit organization whose members are the large majority of railroads operating in the United States, Canada and Mexico (A. 444). A major activity of the AAR is to represent railroads in matters of common interest (A. 444). The AAR is divided into several divisions (A. 444), one of which is the Mechanical Division, which deals with freight car specifications and interchange rules governing the transfer of freight cars among railroads (A. 444-445; Def. Exs. 8, (Book of Exhibits (BE) 55-78), 9, 10). All cars owners become signatory to the rules and agree to abide thereby (A. 446).

As car owners, plaintiff, defendant, and the CB&Q were all parties to the Interchange Rules. (A. 446, 447, 519, 522-523). Plaintiff admitted that it abided by the

rules (A. 560), and the rules themselves preclude a railroad from abiding by some but not by others (A. 560; BE 78).

Types Of Running Gear Bearings In The Railroad Industry

Solid bearing assemblies (sometimes referred to as "plain", "friction", or "sleeve" bearings) as used in the railroad industry are comprised of the journal (the machined end of the axle) (A. 275; A. 637; Pl. Ex. 25; BE 7), a 50 lb. bearing (which is positioned over the journal) (A. 242; Pl. Ex. 20; BE 4), the wedge (which is positioned over the bearing to control movement) (A. 242, 279; Pl. Ex. 21 and 22; BE 5-6), the lubricator pad (which transmits oil to the journal and bearing) (A. 243, 638-39, 530; Pl. Ex. 28; Def. Ex. 22, p. 30), and the journal box (which encloses all components and also contains the lubricating oil) (A. 275, 276-77; Pl. Ex. 29). A solid bearing assembly is depicted in plaintiff's exhibits 108 (BE 18), 109 (BE 19), 110, and 111. In operation, the journal and axle turn with the wheels and draw oil via the lubricator pad from the journal and the bearing (A. 276-77, 638, 603-04).

Use of the solid bearing configuration requires, among other things, inspection and maintenance, involving the assurance of an adequate supply of lubrication (A. 633, 409, 285, 572-75), the proper positioning of the components (A. 634, 640-41, A. 622, 627; Def. Ex. 22, pp. 15-16), the absence of contaminants in the journal box, and the replacement of damaged components, etc. (A. 633-34). By contract and common law, such inspection and maintenance are a primary responsibility of the railroad to which a car has been interchanged. (Def. Ex. 8, Rule

1(a), BE 57. See also Def. Ex. 22).* The components of a solid bearing assembly can be viewed on interchange inspection (A. 325-26, 590-91) by opening the journal box lid.

Roller bearing assemblies as used in the railroad industry are comprised of a journal and a collar consisting of two circular races in which the roller bearings turn (A. 472-73, 608). Attached to the outer race is an adapter, which transmits the load from the rail car. (A. 473, 610). Roller bearing assemblies are sealed units whose interiors cannot be seen on inspection (A. 591). The roller bearing configuration also requires lubrication (A. 608), and to that end, the interchange rules require a "periodic lubrication" every year. (Def. Ex. 8, p. 188 *et seq.*).

Roller bearings were developed and came into use on freight cars after car CB&Q182544 was built (A. 404-05). In 1970, there were many more solid bearing cars than roller bearing cars in the American freight car fleet (Compare Pl. Ex. 151 (BE 41) with Def. Ex. 21, pp. 50-51). For example, at the time of the Crescent City derailment, plaintiff owned a total of 640 cars (A. 300); only 90 were roller bearing cars (A. 300). Plaintiff at the time of the accident, and indeed at the very time of trial, accepted and used solid bearing cars offered in interchange (A. 288-89).

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* Indeed, many courts have held that the delivering railroad parts with responsibility for the car's condition upon the receiving railroad's acceptance thereof in interchange. See, e.g., *Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900, 901 (9th Cir. 1978); *Hunter v. Missouri-Kan-Tex R.R.*, 276 F.Supp. 936, 940-41 (N.D.Okla. 1967) aff'd 433 F.2d 352 (10th Cir. 1970).

History Of Car CB&Q182544 From 1946 To February, 1969

Car CB&Q182544, originally numbered 180477 (A. 369), was manufactured by the CB&Q at Havelock, Nebraska, in 1946 (A. 369). It was equipped with solid bearings (A. 404). The car was placed into railroad service after its manufacture, where it remained (without incident, as far as the record shows) until January-February, 1969, when it, along with 299 other covered hopper cars, was withdrawn from service and taken to Havelock for repairs (A. 364-375). In 1969, the CB&Q shop at Havelock was exclusively a freight car repair shop (A. 368).

During the repair program the solid bearing assemblies on car CB&Q182544 (as well as on the other covered hoppers) were programmed for dismantling, inspection, and repair. The assemblies were inspected, cleaned, and some components, including the bearings, were replaced new, *but in kind* (A. 365-372). The original solid bearing assemblies were functionally upgraded by the addition of later design components to improve performance (A. 377).

There existed in 1969 a conversion technique (A. 381-82, 405) by which the journal box assemblies on car CB&Q182544 could have been converted to roller bearings. As of the 1969 repair program, no bearing conversions on existing cars had ever taken place at the Havelock shop (A. 388). No industry practice was proved that it was customary to make such conversions during the course of repairs of this type. The sole evidence on that point was to the contrary (A. 438-440), and in fact there was no evidence that any railroad, in a repair program such as the one before the Court, had ever converted its cars from solid bearings to roller bearings.

Conversion in 1969 would have cost an additional $1425 per car* (A. 405). The actual project cost of repairing all 300 cars was $519,943.62 (A. 529), and the average repair cost per car was $1,733.00 (Pl. Ex. 120; A. 531). For conversion of the 300 cars to roller bearings, an additional expense of some $413,000.00 would have been incurred, according to Mr. Julian Sapp, a plaintiff's witness (A. 433).

Effective August 1, 1966, AAR rules required roller bearings or cartridge type solid bearings on all *new or rebuilt* 100 ton cars (Def. Ex. 8, Rule 3(j)(7)(b), p. 37, BE 65), which were troublesome newcomers to the railroad scene (A. 436-37). Thereafter, as of August 1, 1968, the AAR rules required roller bearings on all *new cars* (A. 448-49). In February, 1969, as to existing cars other than rebuilt 100 ton cars, AAR rules did not require conversion of solid bearings to roller bearings during either repair or rebuilding operations. (Def. Ex. 8, Rules 3(j)(7)(b), 3(j)(8), 3(j)(9), at pages 37-38; BE 65-66).

The AAR rules relating to bearings involved in this case, which were in existence at least since January 1, 1968**, were voted on by the membership of AAR (A. 449). Until September 1, 1968, when it voluntarily resigned its *voting* membership (A. 647), plaintiff was a voting member of AAR (See Article 2 of Pl. Ex. 169). Its voting rights were then transferred to Santa Fe and Penn Central (A. 519), each of which owned 50% of the plaintiff's stock (A. 519). Both Santa Fe and Penn Central had been members of the AAR Committee which developed the bearing rules (A. 451).

* Plaintiff's witness Julian Sapp estimated the additional cost of $1,378.13 per car (A. 433).

** See Def. Ex. 8, pp. 2-6, 37-38 (the January 1, 1969, AAR Interchange Rules), showing that no changes had been made during 1968 as respects the bearing rules.

Car CB&Q182544 was a standard 70 ton covered hopper (A. 380). Plaintiff agreed that CB&Q's 1969 work on that car violated no AAR rules (A. 434).

History Of Car CB&Q182544 From February, 1969 To June 20, 1970

After the 1969 repair program, car CB&Q182544 was returned to service (A. 398-99). During the 17 month period from its return to service until June 20, 1970, the day before the Crescent City derailment, the car was handled by some 20 different railroads (eleven times by plaintiff) and traveled some 16,623 miles, 8140 while loaded and 8483 while empty (A. 399; Pl. Ex. 140; BE 32 *et seq.*). During that period of service, certain additional repairs were made to the car. On September 30, 1969, two broken bearings and two broken wheel truck springs were replaced by the CB&Q (A. 411). On October 21, 1969, a broken bearing was replaced as well as some broken springs and a worn out brake shoe (Pl. Ex. 142). That work was performed by the Penn Central. (*Id.*)

Each of the replaced bearings and springs was at a location on the car other than that involved in the Crescent City incident (A. 411) (Pl. Ex. 141, 142). The September 30, 1969, and October 21, 1969, bearing and spring breakage resulted from "lateral forces" (A. 627) not associated with hotboxes and did not result from causes common to the cause of the L-4 journal burnoff which occurred on June 21, 1970, and culminated in the Crescent City derailment (A. 622-23).

On June 19, 1970, car CB&Q182544 was received on defendant's line at Galesburg, Illinois, loaded with sand (Pl. Ex. 140; BE 39). At that location, defendant's car inspectors twice inspected the car; in each case the inspection consisted of checking all running gear, safety

appliances, inspection for structural defects, including opening each journal box lid and checking the journal and bearing with feeler hooks (A. 412-413), devices used to discover bearing damage.

On June 20, 1970, car CB&Q182544 was interchanged by defendant to the Peoria & Pekin Union Railroad (P&PU), which then interchanged it to plaintiff (A. 330). There was no evidence at all as to the manner of the car's handling by the P&PU. Although plaintiff's yard clerk noted receipt of car CB&Q182544 at 7:00 p.m. (A. 328, 330) plaintiff's record of receipt shows that the car was included in a cut of 35 cars received at plaintiff's East Peoria, Illinois, yard at 1400 hours (Pl. Ex. 143; A. 428). That, of course, was 2:00 p.m. that afternoon (A. 530).

Some five hours after the car's 2:00 p.m. receipt by plaintiff it was inspected by two of plaintiff's car inspectors, Bobby Tracey and Jay Young (A. 333-354). These men were to hunt for car damage (A. 332), anything broken, out of repair, or questionable (A. 332). If possible, they repaired damages they found (A. 332). That which could not be repaired was noted on the car, which was then "bad ordered" and sent to the repair shop (A. 332).

Car inspector Young testified that plaintiff's inspectors were equipped with tools such as feeler hooks, wheel flange gauges, pliers, oil cans (A. 332), bad order cards and a flashlight (A. 346). Tracey said car inspectors also had plungers available to them for the removal of water from journal boxes (A. 348, 350). When a defective car was discovered, a record of that fact would be made and nailed to the car (A. 333). The absence of any record would indicate the car had passed its interchange inspection (A. 333, 349). No such record for car CB&Q182544 was proven.

The side of the car involved in the Crescent City derailment was the north side (A. 336-37, 350-51). Young inspected that side some time between 6:50 p.m. and 7:25 p.m. on June 20, 1970 (A. 345) when it was given its interchange inspection on Track 24 (A. 330-31). At that location, Track 24 runs east and west in the TP&W East Peoria yard (A. 330). Tracey inspected the south side of the car (A. 337, 350-51).

Mr. Young was an apprentice inspector (A. 335) in June, 1970. He had no specific recollection of inspecting car CB&Q182544 (A. 336) on June 20, 1970. His testimony was limited to an explanation of his routine practices (A. 337). Young said he could detect the difference between a solid bearing car and a roller bearing car *at a glance* (A. 338). During his routine inspection of a solid bearing car, he would open the journal box lid (A. 340). If he found solid contaminants in the journal box oil, he would attempt to remove them with his feeler hook (A. 341). He never changed oil because it was dirty (A. 341). If there was a quarter inch of sand on the bottom of a box, he would add oil and let the car go (A. 341). If there was water in a box, he would on occasion send the car to the repair track (A. 342). Sometimes, however, he would add oil to force the water out of the back of the box (A. 342), apparently assuming that water floats on oil rather than the reverse, which is the case (A. 572). Tracey said water should be removed by using a plunger (A. 350).

Mr. Young said that a feeler hook was employed to feel the edges of the solid bearing in a journal box (A. 343). If they weren't smooth, he knew something was wrong and the car would be "bad ordered" (A. 343). Sometimes he felt only one side of the bearing (A. 343), and he would not do so at all unless he felt reflected heat

from the box or saw smoke when the box lid was lifted (A. 343). If he detected heat and could not see anything wrong with the bearing, he would "bad order" the car (A. 344). He said that cars sometimes stood for substantial periods before they were inspected (A. 344). He stated that it was possible for a journal box in a cut of cars to be missed (A. 339-40).

After the cars were inspected, they were classified by destination (A. 549). Other yard switching followed, leading up to the assembly of train 20 (A. 549). As assembled, train 20 was comprised of 103 loads and 5 empties, one caboose and four locomotives (A. 293). One of the acts to be performed in assembling train 20 was a "final double".

In that maneuver, 55 cars located on track 4 in plaintiff's East Peoria yard, constituting what would be the front end cars of the train, were moved to track 24 where they were to be coupled to the cars making up the rear of the train (A. 532, 546-47). During this movement, one locomotive was at the front pulling slightly upgrade, while another was at the rear pushing from that end (A. 532). As the cut of 55 cars moved in the yard, 3 large tank cars of liquefied petroleum gas were derailed, those being the 27th, 28th, and 29th cars counting from the front of the cut (A. 532-34). The derailed cars were left in the yard for rerailing the following morning (A. 542). The rest of the cars in the cut were incorporated into train 20 (A. 532). Included in those was car CB&Q182544 (A. 541-42), which was the 20th car from the front of the 55 car cut (A. 292).

As a result of the yard derailment, which damaged 150 feet of track (A. 533), yard conductor Terry Reardon made out an accident report (Def. Ex. 23A; A. 532-33). He concluded that a crossover switch must have split (A. 533). However, Reardon had not inspected the switch (A. 533).

In June, 1970, trainmaster Earl Franks was in charge of all train movements on the TP&W, including yard operations at East Peoria yard (A. 537-38). He was on vacation on June 21, 1970 (A. 538), but after the Crescent City derailment, and on the same day (A. 539), he was called in to investigate the cause of the East Peoria yard derailment which had taken place early that morning (A. 538). He read Reardon's accident report (A. 539). He also inspected the track and switch where the train derailed in the yard and determined that the switch was "alright" (A. 539). He concluded the switch had not caused the derailment (A. 539). He then wrote a memorandum (Def. Ex. 25) in which he concluded that the derailment was caused by "slack action", a bumping of cars when they are bunched together (A. 540). Normally "slack action" does not derail cars in the yard (A. 541). He also stated that the engine on the west pushing harder than the engine on the east was pulling could have caused the derailment (A. 541) as the cut of cars went through the turnout (A. 541).

Unlike on the BN and other railroads, there was no practice on the TP&W in June, 1970, to inspect journal box components after yard switching or after yard derailment incidents on cars themselves not derailed (A. 541). Thus, when train 20 was completed, it was given an air brake test (A. 182-83), but the lids on the journal boxes were not lifted for inspection of the journal components (A. 182).

The Trip In Question

Plaintiff's East Peoria yard is located at Mile Post 108 (A. 548). Crescent City is located at Mile Post 17 (A. 548). On June 21, 1970, because of the yard derailment, train 20 left the yard late, at 3:25 a.m. (A. 177, 196). The trip easterly from East Peoria to Gilman, Illinois, was routine (A. 177-78). At Gilman, Illinois, where plaintiff's single track crossed the Illinois Central (IC) double track (A. 210), the train crew purportedly received a "high ball" or "go" signal from the IC operator (A. 210, 645-47). That meant everything was in order (A. 175).

One half-block east of the IC Gilman depot, a member of the public, Mr. Raymond Nelson, was on the north side of the TP&W tracks, enroute to a part-time job (A. 583). He was waiting for train 20 to go by (A. 583). As he stood there, he noticed a wheel on fire (A. 583) on the north side of the train (A. 583). The fire was about two or three feet long (A. 583). He followed it with his eyes "for quite a while" (A. 583). He intended to warn the men in the caboose, but someone in the vicinity shouted his name and he was diverted. When he turned back, the caboose had passed by (A. 584).

Some blocks (a half mile or less) further east, on the east edge of Gilman, the TP&W rails cross State Route 45 (A. 211, 577). At that crossing, Mr. E. Fay Peters, another member of the public, was stopped on the north side of the tracks by approaching train 20 (A. 577). As the train came, he noticed a flaming hotbox on the north side front wheels of a covered hopper car (A. 577). He got out of his vehicle to alert the crew in the caboose as it went by (A. 577). He waved his arms over his head as though he were performing a calisthenics exercise (A. 577). There was a man in the north side of the caboose facing forward. He had his head down on his chest (A.

578). According to Peters, the man was either reading or asleep (A. 578) and did not respond to Peters' signal (A. 578). Mr. Witbracht, the rear brakeman on the north side of the caboose, denied that he had been asleep or inattentive (A. 219). However, Witbracht admitted that Peters may have been there and given a signal (A. 213). Witbracht agreed that he may simply have forgotten about the matter (A. 213-14). At that time, Peters was standing about 15 feet from the caboose (A. 582). In its response to defendant's interrogatories, plaintiff admitted that Peters had detected the hotbox (A. 527-28), and in his opening statement plaintiff's counsel admitted that Peters had attempted to alert the crew of the problem (A. 173). At the time the train passed Peters, one could see without artificial illumination (A. 203, 214).

The distance from Gilman to Crescent City is eight miles (A. 211). The train with its hotbox traversed that eight miles without detection by the crew at speeds up to 49 miles per hour (A. 181). At a point 6,920 feet west of where the general derailment took place at Crescent City (A. 280-81), the end of the axle (journal) on car CB&Q182544 burned off at position L-4 of the lead truck (the front north wheel). When that took place, the truck side frame at L-4 position lost its support, dropped down, and began to make intermittent contacts with the track structures (A. 281). Those contacts continued with increasing frequency as the train moved easterly (Pl. Ex. 84, A. 282). At a point 960 feet west of the general derailment, the dragging truck side frame struck the Route 49 crossing which is near the west edge of Crescent City (A. 282). When it came down, all the wheels on the lead truck derailed and ran on the ties for the last 960 feet before the general derailment occurred (A. 290).

As train 20 approached Crescent City, but prior to its entry into the town, the difficulties experienced by car CB&Q182544 were observed by a Mr. James Thrasher, another member of the public, who was standing at a filling station near the tracks (A. 585). He said the front end of the car was ablaze, with flames running two or three feet up its side (A. 586). It appeared to him that the trouble could have been seen from the engine (A. 586).

During 1970, plaintiff operated its trains under its "Transportation Rules" (Def. Ex. 28; A. 559). That was the "Bible" for all TP&W train operations (A. 559). Rigid adherence to those rules was expected of all TP&W train employees (A. 559). There were rules telling employees to be constantly on the lookout for hotboxes and for signals from railroaders and also from members of the general public (A. 236, 559-560). Both the conductor and rear brakeman said that during their railroading experience, they had received and acted upon distress signals from members of the public (A. 204, 221).

Plaintiff's Hotbox Record

Over a 5½ year period subsequent to July 1, 1965, plaintiff had experienced a total of 162 hotboxes (Pl. Ex. 90, 91; BE 11, 17; A. 272). When hotboxes are detected, the practice is to stop the train, inspect the car and remove it from the train, if necessary (A. 301). Typically, surveillance and inspection does contain the hazards of hotboxes before they turn into burnoffs (A. 302). Out of the 162 hotbox occurrences on the TP&W, there were five burnoffs in 5½ years (A. 302), including one involving a roller bearing (A. 556). Those burnoffs were not detected by the crews (A. 555). Other than the

Crescent City derailment, none of the hotboxes or burnoffs involved human injury. (A. 302). The one at Scottsburg on April 1, 1970, involving a roller bearing, was the largest single experience of property damage from a failed journal on the TP&W prior to the Crescent City derailment (A. 556, 568).*

Mechanical Hotbox Detection Devices

Over the foregoing 5½ year period, a pattern of hotbox incidents was proved. For example, hotboxes had occurred near Mile Post 27.5, just west of Gilman, Illinois, on 19 occasions on eastbound trains, and on 4 occasions on westbound trains (A. 556). That difference was because larger tonnage moved eastbound on the TP&W (A. 555). Prior to the Crescent City derailment, plaintiff was considering the installation of mechanical hotbox detectors on its line at appropriate locations (A. 559). Such devices monitor the running gear of passing trains. If excess heat is detected, that information is transmitted to the train crew via a digital electronic board located near the tracks (A. 551-53). By looking at the board after the train has passed, the caboose crewmen are able to ascertain (1) whether excess heat exists, and (2) its exact location in the train (A. 552). If excess heat is detected, the train will be stopped and the matter investigated (A. 552-53).

Eleven days before the Crescent City derailment, Mr. Polich, a high ranking TP&W officer, and Mr. Franklin, TP&W's assistant chief engineer, took a trip on the TP&W line between Effner and East Peoria to establish

* In his 25 years of railroading experience, defendant's claims administrator knew of no instances of personal injury on his railroads from hotbox or failed journal occurrences (A. 568).

locations for hotbox detectors (A. 554). As a result of that trip, it was determined that a hotbox detector should be located at Mile Post 27.5 (A. 557), just 10 miles from Crescent City. After the Crescent City derailment, August 1, 1971, a hotbox detector was installed there at an approximate cost of $25,000 (A. 550). Mr. Polich was aware of the availability of hotbox detectors at least since 1964 (A. 559).

The Outside Experts

Plaintiff's sole expert was Dr. Terrance Willis, a professor of mechanical engineering (A. 451). Dr. Willis opined that if car CB&Q182544 had been equipped with roller bearings, the Crescent City derailment would not have occurred (A. 472). Dr. Willis took no issue with the bearing assembly on the car CB&Q182544 in a physical or manufacturing sense, *viz.* he eschewed any contention that any of the components in the L-4 journal box were physically defective (A. 492). In Dr. Willis' view, solid bearings were "obsolete in the sense that [they] can no longer do [their] job" (A. 498). Dr. Willis further testified that, in his opinion, 70 ton covered hopper cars in February, 1969, were "unreasonably dangerous" *per se* if equipped with solid bearings (A. 470-71; 497-98). Dr. Willis is the only one who, up to the time of the trial below, had ever rendered such an opinion (A. 498-99).

One of defendant's experts was Sergei Guins, a mechanical engineer with experience in the railroad industry (A. 598-600). According to Mr. Guins, the failure of the L-4 journal in question was caused by an interference with lubrication due to misalignment of journal box components which occurred as a result of the switching and the derailment at plaintiff's East Peoria yard (A. 621-22). When asked on cross-examination if car CB&Q182544 had been equipped with roller

bearings, the Crescent City derailment would have occurred, he replied that he didn't know (A. 627-28). He opined that solid bearings were not "unreasonably dangerous" (A. 622). He further opined that if an operating mechanical hotbox detector had been in place at Mile Post 27.5 on the date of the accident, the derailment would not have occurred (A. 623-24). When asked on cross-examination about the bearing breakage on car CB&Q182544 between February, 1969, and June 20, 1970, Mr. Guins attributed same to physical damage caused by excessive lateral forces (A. 627) not associated with hotboxes (A. 623). While he did not feel that car CB&Q182544's repair history was unusual (A. 627), he indicated that the bearing breakage during that period was ". . . more than I would like to see. . ." (A. 627-28).

Another expert called by defendant was Dr. Paul Rhine, the engineer of tests for the Union Pacific Railroad (A. 587). Dr. Rhine testified that the roller bearing configuration is just as likely to suffer damage from longitudinal impacts as its solid bearing counterpart (A. 590). Damage done to solid bearing components is, however, more easily detectible on inspection (A. 590-91), the roller bearing assembly being a sealed unit (A. 591). Dr. Rhine indicated that with proper maintenance, handling, etc., roller bearings are capable of lasting for 1,500,000 miles (A. 594). Expected useful life of solid bearings is "roughly comparable" (A. 594). When asked about the service history of car CB&Q182544, Dr. Rhine testified that the post-February, 1969-pre-June 21, 1970, bearing breakage would be unusual, assuming proper handling, maintenance and inspection of the car during that period (A. 597). *There was no evidence as to handling and inspection of car CB&Q182544 during its use by some 20 railroads during the period February, 1969 through June 18, 1970.*

History Of The Litigation

Plaintiff filed this action on June 19, 1972, in two counts, count I sounding in strict liability and count II in common law negligence (A. 1). Defendant's motion to dismiss the initial complaint (A. 6) was allowed (A. 9), whereupon plaintiff filed an amended complaint, again using the legal theories originally employed (A. 10). Defendant moved to dismiss count I on the basis that the strict liability doctrine does not apply in this case (A. 15). Defendant also moved to dismiss count II, on the bases that (1) a complaint seeking indemnity under a negligence theory under circumstances here present does not state a cause of action when the plaintiff pleads its own due care (A. 17) and, (2) that plaintiff was improperly seeking indemnity from at worst a joint tortfeasor (A. 17). The trial court denied defendant's motion and ordered that defendant file its answer (A. 20), whereupon defendant answered the amended complaint (A. 20) and raised affirmative defenses to count I of (1) assumption of risk (A. 22) and (2) misuse of product (A. 37).

On October 11, 1976, the cause came on for trial (A. 97). Plaintiff completed its case in chief, whereupon defendant filed its motion for directed verdict (A. 98), which was "taken with the case" (A. 514, 102). Defendant then put on its evidence, which concluded on October 28, 1976 (A. 643). After plaintiff's rebuttal evidence, defendant again moved for a directed verdict (A. 106) upon which motion ruling was reserved (A. 110). The case went to the jury on October 29, 1976, after oral argument by both sides (R. 1632-1708) and instructions to the jury (A. 149-172).*

* On page 2 of its petition, plaintiff implies that since the issues instructions which went to the jury were tendered by defendant, it cannot be heard to assert that the case should

(Footnote continued on following page)

The sole charge of an "unreasonably dangerous" condition was one of design; that defendant failed in 1969 to equip car CB&Q182544 with roller bearings (A. 165-69). The only charge of negligence also related to design, *viz.* solid bearings v. roller bearings (*id.*). The jury returned its verdicts (A. 111-12) and answers to special interrogatories* finding in favor of plaintiff on each count of the amended complaint and assessing damages in the sum of $1,787,491.05. Judgment was entered in that amount (A. 115).

Defendant filed a post-trial motion (A. 115). On May 20, 1977, hearing was held on that motion, and on August 11, 1977, the court entered its order denying the post-trial motion in all respects (A. 145).

On appeal to the Appellate Court for the Third Judicial District, the judgment for plaintiff was reversed, as shown by the appendix to the petition filed in this Court. The appellate court's decision is reported at ..... Ill. App. 3d ..... , 385 N.E.2d 937 (3rd Dist. 1979).

footnote continued

not have been submitted to the jury. Plaintiff fails to point out that, prior to the instructions, defendant moved twice for directed verdicts as to each of plaintiff's theories. Those motions were reserved, but ultimately denied by the court in connection with its denial of defendant's post-trial motion (A. 145). Such being the case, defendant's tendering of instructions does not constitute a waiver of the contention that the case should not have been submitted to the jury in the first place. *West Chicago St. R. Co. v. Liderman*, 187 Ill. 463, 468, 58 N.E. 367 (1900); *Hamilton v. Baugh*, 335 Ill.App. 346, 352, 32 N.E.2d 196 (4th Dist., 1948). See also Ill. Rev. Stat. 1975, ch. 110 § 68.1(2).

* Special Interrogatory 1 asked if car CB&Q182544 had been "rebuilt" in February, 1969. The jury answered in the affirmative (A. 112). Special Interrogatory 3 asked if plaintiff had been guilty of contributory negligence. The jury answered in the negative (A. 113). A Special Interrogatory 2 was withdrawn (A. 699).

ARGUMENT

Plaintiff's "statement of facts", which is argumentative and sometimes inaccurate, contains several assertions which are unsupported by the record.

For example, on page 8 of the petition it is stated that "[s]tudies demonstrated that the hot box problem was inherent in the plain bearing design simply because the normal forces reasonably to be expected in ordinary railroad service can still result in dynamic loads at the journal higher than the oil film between the journal and the bearing can tolerate." There are no such "studies", in the sense intimated by plaintiff. What are referred to are nothing more than a collection of ideas put together in the last two months before trial of this case by Dr. Willis, plaintiff's sole expert, specifically *for* testimony in this case (A. 498-99). Moreover, while Dr. Willis impugned the solid bearing design *per se* as respects 70 ton covered hopper cars, he did so only on the basis that a few of such bearings, his hypothesized "weak" ones, which come along "sooner or later", based upon an "engineering distribution", would be unable to withstand dynamic loads in excess of 65,000 pounds. Dr. Willis fully admitted that the large majority of solid bearings in 70 ton covered hopper cars were entirely adequate to handle the loads he projected for railroad service (A. 470-71).

The fatal problem with Dr. Willis' testimony is that there was *no* evidence that the L-4 bearing on car CB&Q182544 was, in February, 1969, one of his "weak" ones. Under those circumstances, plaintiff's only evidence on both "unreasonably dangerous" and "cause in fact" amounted to sheer speculation. See A. 126-132.

On page 9, plaintiff adverts to Mr. Robert Taylor's testimony that roller bearings are less subject to failure than solid bearings. However, the context of Mr. Taylor's full testimony was that both designs perform well *if they receive proper attention* (A. 409).

On the same page (as well as on pages 25-26), plaintiff implies that railroads generally, including the L&N, were "retrofitting" solid bearing cars with roller bearings. That is not accurate. Prior to the repair of car CB&Q182544 in 1969, the *only* retrofitting even implied by the evidence was that of the L&N, and even then only with respect to "rebuilt" cars as that term is used in the industry (A. 440).* L&N *did not* retrofit its cars when they were undergoing repairs of the kind here involved (A. 440). Further, there was no evidence that any railroad had *ever* converted its 70 ton cars from solid bearings to roller bearings in any such repair program.

On page 10, plaintiff states that subsequent to February, 1969, defendant "made roller bearing conversions of its older freight cars." Plaintiff fails to couple that observation with the further proof that such conversion took place more than three years *after* the 1969 repairs here involved, and also took place in a "rebuilding" program as that term is used in the industry (A. 632).

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* The jury's special finding to the contrary notwithstanding, car CB&Q182544 was not "rebuilt" in 1969 as that term of art is used in the railroad industry. Under the industry definition contained in Rule 112 of the AAR rules (Def.Ex. 8, Rule 112, Sec. F.5, a car is not "rebuilt" unless repair costs exceed 50% of the car's reproduction cost and unless certain specified items are repaired or replaced. Plaintiff made no attempt to prove a rebuilding under Rule 112, and defendant established that the 1969 repairs did not even come close to 50% of reproduction cost. (The reproduction cost was $7,212.33, and the approximate cost of the 1969 repairs was $1,733.15 (A. 531; Def. group ex. 27, p. 9)).

On page 11, plaintiff asserts that conversion of car CB&Q182544 and its companions "would have been relatively easy," referring to page 385 of the abstract. As to whether such a conversion is "easy", see an elaboration of the process at 379-385 of the abstract. Conversion involves substantial cutting, machining, drilling, the pressing on of the wheel, and other work. "Easy" it is not. Costly, it is.

On page 11, plaintiff asserts that defendant's assistant shop superintendent suggested "that roller bearings be installed." That "suggestion" did not even relate to the 1969 repair program, having been made in 1971 or 1972. It is completely divorced from the issues in this case (A. 375, 530).

Also on page 11, plaintiff implies that car CB&Q182544 was somehow substandard because it sustained five broken springs and three broken bearings between its 1969 repairs and the Crescent City accident. No such implication may be made, for although solid bearings can last for 1.5 million miles, that assumes proper handling, maintenance, and inspection (A. 597). There was simply *no* evidence as to handling of the car during its use by some twenty railroads during the period February, 1969, through June 18, 1970. Untold (as well as unknown) impacts and stresses causing that damage may have occurred during that period. As a matter of fact, the existence of *broken* springs and *broken* (not overheated) bearings suggests that there had been impact and stress. Under the evidence, there can be no inference that car CB&Q182544 somehow had physically "defective" bearing assemblies in February, 1969 (See *Erzrumley v. Dominick's Finer Foods, Inc.*, 50 Ill. App. 3d 359, 365 N.E.2d 684, 687-88 (1st Dist. 1977)), a matter readily conceded by plaintiff's own expert when he assumed the prior bearing and spring

repairs (A. 456) and then admitted that he took no issue with car CB&Q182544's L-4 bearing assembly in any physical or manufacturing sense (A. 492).

I.

By Reversing The Judgment Of The Circuit Court The Appellate Court Did Not Deprive Plaintiff Of Any Constitutional Right To Trial By Jury.

Plaintiff purports to appeal to this Court "as a matter of right pursuant to Supreme Court Rule 317" on the ground that the appellate court's decision deprived plaintiff of its right to trial by jury under the Illinois Constitution and the Constitution of the United States. In that regard, plaintiff would have this Court ignore the nature of the appellate court's holdings in support of its decision and well-settled case law regarding the right to trial by jury from both this Court and the Supreme Court of the United States. In so doing, the transparency of plaintiff's attempt to "transform" a case not appealable as a matter of right into one so appealable is obvious.

As is evident from its opinion, the appellate court based its reversal on its holding that the design of car CB&Q182544 did not, as a matter of law, create a condition unreasonably dangerous to plaintiff, "and on the basis of the undisputed facts in the record, it was error to submit the case to the jury." From that holding, the court further concluded that "there was no basis for a finding of negligence since the bearing was not physically defective and the design was not unreasonably dangerous but was customarily used within the industry."

Thus, it is clear from the plain language of its opinion that the appellate court held, in accordance with the standard enunciated in *Pedrick v. Peoria and Eastern*

Railroad Company, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967), that all of the evidence, when viewed in its aspect most favorable to plaintiff, so overwhelmingly favored defendant that no contrary verdict based on that evidence could ever stand. Accordingly, the appellate court did not, as alleged by plaintiff, "simply urge its view of the evidence in support of a verdict for the defendant," but instead held that the circuit court erred in denying defendant's motions for a directed verdict in accordance with the standard enunciated by this Court.*

By here contending that the appellate court held that plaintiff never even had the right to a jury trial, plaintiff essentially asserts that the law requires in every case that a jury consider the evidence irrespective of whether or not that evidence is sufficient to support a verdict. However, as early as 1888, in *Commercial Ins. Co. v. Scammon*, 123 Ill. 601, 14 N.E. 666, this Court stated the governing principles as follows:

> "The question of fact, when there is in the evidence a real controversy of fact, must be tried by the jury, but it is for the court to say whether evidence offered is pertinent to the issue, and also whether there is sufficient evidence before the jury to present an issue of fact, under the pleadings, and if there shall not be, to direct what verdict shall be returned. . . . And so, if the jury were to find for the defendant, when the evidence given at the trial, with all the inferences that they could justifiably draw from it, is so insufficient to support their verdict that the court would have been warranted in directing them to find for the plaintiff, but failed to

* Because the appellate court *applied* the *Pedrick* standard in reversing the circuit court's judgment, the court's failure to perfunctorily cite *Pedrick* in its opinion is of no consequence, notwithstanding plaintiff's suggestion to the contrary. Use of the *Pedrick* standard was of course urged by defendant in its appellate brief.

> do so, *an appellate court, in rendering the judgment that should have been rendered in the circuit court, no more invades their province than would the circuit court, under those circumstances, had it directed what verdict the jury should return.*" (Emphasis added) 123 Ill. at 605.

Since *Scammon*, this Court has applied these principles on several occasions. *See, e.g., American National Bank v. Woolard*, 342 Ill. 148, 157, 173 N.E. 787 (1930); *Darmody v. Kroger Grocery Co.*, 362 Ill. 554, 558, 1 N.E.2d 56 (1936). And, after holding that *all* of the evidence in a case (and not only the evidence against the party who has moved for a directed verdict) must be considered by the court in ruling on a motion for a directed verdict or judgment notwithstanding the verdict, this Court in *Pedrick* stated:

> "Clearly, the constitution does, and judges should, carefully preserve the right of the parties to have a substantial factual dispute resolved by the jury, for it is here that assessment of the credibility of witnesses may well prove decisive. (See Ill. Const. Art. III, Sec. 5, S.H.A.; Note, 107 U.Pa.L.Rev. 217.) But the presence of *some* evidence of a fact which, when viewed alone may seem substantial, does not always, when viewed in the context of all of the evidence, retain such significance. As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole. Constitutional guaranties are not impaired by direction of a verdict despite the presence of some slight evidence to the contrary (*Chamberlain*, Blume, "Origin and Development of the Directed Verdict," 48 Mich. L.Rev. 555, 576-7), for the right to a jury trial includes disputes of some substance." 37 Ill.2d at 504-05.

In *Abrams v. Awotin*, 388 Ill. 42, 57 N.E.2d 464 (1944), a case in which the defendant moved to dismiss a

writ of error prosecuted by the plaintiff, the plaintiff made the same argument in defense of its writ as that made by plaintiff here. Rejecting the plaintiff's contention, this Court held:

> "The substance of the attack on the judgment of the Appellate Court is that its enforcement will deprive plaintiffs of their constitutional rights of trial by jury and due process of law. These issues present the question merely of the validity of the judgment and not constitutional questions. (*Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300.)" 388 Ill. at 51.

In *Robinette v. Department of Public Works & Bldgs.*, 48 Ill.2d 259, 269 N.E.2d 477 (1971), this Court reaffirmed the principle that, for purposes of appeals as a matter of right based on the ground that the case involves a question under the Constitution of the United States or of this state, constitutional questions which have been resolved under previous decisions of this court will not be considered "substantial" and therefore will be insufficient to invoke this Court's appellate jurisdiction. See also *Fulford v. O'Connor*, 3 Ill.2d 490, 494, 121 N.E.2d 767 (1954). In view of the fact that this Court has rejected plaintiff's contention of denial of right to trial by jury on numerous occasions (see, for example, *Commercial Ins. Co. Scammon*, *American National Bank v. Wooland*, and *Darmody v. Kroger Grocery Co.*, *supra*), the decision of the appellate court raises no substantial constitutional question under the Illinois Constitution. Compare Art. 1 § 13, Ill. Const. of 1970 with Art. 2, § 5 of Ill. Const. of 1870.

Furthermore, there is no substantial constitutional question presented under the Seventh Amendment to the Constitution of the United States. In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S.Ct. 1072

(1967), a federal case with procedural facts virtually identical to those of the case at bar, the Supreme Court stated the issue and its holding as follows:

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v. See Baltimore & Carolina Line, Inc. v. Redman, supra.* 386 U.S. at 321-22; 87 S.Ct. at 1076.

Based on the foregoing, the decision of the appellate court did not deprive plaintiff of a right to trial by jury under either the Illinois Constitution or the Constitution of the United States. Thus, plaintiff has no appeal as a matter of right on that basis.

II.

The Appellate Court Correctly Held That The Evidence, As A Matter Of Law, Failed To Support A Verdict That Defendant Was Negligent.

On pages 17-19 of its petition, plaintiff asserts that a number of facts are "established" when the evidence is viewed in its aspects most favorable to plaintiff. Although plaintiff has taken license in its characterization of many of those so-called facts, two of the more exaggerated statements are worthy of comment. In paragraphs 2) and 5) respectively, plaintiff states that "in 1969 and for years prior thereto roller bearings were available which *greatly* reduced the possibility of hotbox

failure on freight cars," and that the "Burlington . . . made roller bearing conversions on *all* its older freight cars." (Emphasis added.) As will be seen from examination of the pages of the abstract cited by plaintiff, neither of the foregoing "facts" are established by the record.

Moreover, although plaintiff repeatedly cites and invokes *Pedrick v. Peoria and Eastern Railroad Company, supra*, it nevertheless invites this Court to consider only a small portion of all of the evidence. That such a consideration does not meet the *Pedrick* standard is obvious from a complete reading of that opinion. 37 Ill.2d 494, 504-05, 229 N.E.2d 504, 510.

Among the established facts omitted by plaintiff in its recitation are the following, each of which stands uncontroverted: during the year 1971, two years *after* the 1969 repairs involved in this litigation, reports submitted to AAR were showing ". . . increased hot-box set outs involving roller bearings . . ." (BE 41); both solid bearings and roller bearings are equally as likely to suffer damage (and resultant failure) from longitudinal impacts which may occur during rough handling (A. 590); damage done to solid bearing components, however, is more readily detectable on inspection (A. 590-91; 613); both plaintiff and defendant agreed to be bound by the AAR Interchange Rules prior to the accident (*supra*, pp. 4-5), including those rules governing the kinds of journal bearings acceptable on various kinds of cars and the rule requiring member railroads to inspect, lubricate, and be responsible for the condition of all cars on their lines; by retaining the solid bearing design on car CB&Q182544 in its 1969 repairs of that car, defendant fully complied with the interchange rules to which plaintiff and defendant had agreed (A. 434); plaintiff had in-

timate knowledge concerning the operation and propensities of journal bearings on freight cars (A. 551-59); at the time of the derailment in question, plaintiff owned a total of 640 cars, only 90 of which were equipped with roller bearings (A. 300); plaintiff knew the bearings on car CB&Q182544 were solid bearings when it accepted the car in interchange (A. 338); based in part on a trip before the accident, plaintiff's management determined that a hotbox detector should be located at a point approximately one-half mile from where the hotbox resulting in the accident was first observed (A. 557), which detector would have detected the hotbox in question (A. 623-24); and finally, not only did plaintiff voluntarily agree to abide by the AAR rules permitting retention of solid bearings on the category of cars to which car CB&Q182544 belonged, it was a voting member of the AAR when such rules were adopted and its coowners had been on the committee which developed the rules (*supra*, p. 8).

Under the facts of this case, defendant's duty to plaintiff was to comply with AAR rules concerning the types of journal bearings to be used on repaired 70 ton hopper cars. Defendant satisfied that duty; indeed, plaintiff agreed that defendant's 1969 work on car CB&Q182544 violated no AAR rules (A. 434). Accordingly, the appellate court was correct in holding that defendant was as a matter of law not negligent. As aptly stated in *Flaugher v. Sears, Roebuck & Co.*, 61 Ill. App. 3d 671, 378 N.E.2d 337 (5th Dist. 1978):

> "[W]here, as here, the manufacturer has endeavored to construct a product to function properly for the purpose for which it is designed *and its operation creates no danger that is not known to the user, the manufacturer has satisfied its duty.*" 378 N.E.2d at 340. (Emphasis supplied.)

The appellate court in the instant case reversed the judgment of the trial court based on the theory of strict liability holding, *inter alia*, that defendant's retained use of a solid bearing design on car CB&Q182544 did not, as a matter of law, create a condition unreasonably dangerous to plaintiff. From that holding, the court further concluded that "there was no basis for a finding of negligence since the bearing was not physically defective and the design was not unreasonably dangerous but was customarily used within the industry."

In so ruling, the appellate court recognized that if a design is not unreasonably dangerous or "defective" as respects a plaintiff for purposes of strict liability, a defendant's use of that design respecting the same plaintiff cannot be a breach of duty to use reasonable care for purposes of negligence. As this Court stated in *Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill.2d 339, 247 N.E.2d 401 (1969):

> "Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function. . . ." 247 N.E.2d at 403.

Significantly, courts of a number of jurisdictions have expressly held that if the design of a product is not unreasonably dangerous for purposes of strict liability its use cannot constitute negligence. *e.g., Halvorson v. American Hoist & Derrick Co.*, 307 Minn. 48, 240 N.W.2d 303, 307 (1976); *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934, 937, 939 (1977); *Masi v. R.A. Jones Co.*, 163 N.J.Super. 292, 394 A.2d 888, 890-91

(1978); *McIntyre v. Everest & Jennings, Inc.*, 491 F.2d 1239, 1242 (5th Cir. 1974) (applying Arkansas law).

In the present case, the trial court allowed a jury to find defendant liable to plaintiff for a derailment of plaintiff's train though the design configuration attacked by plaintiff had been knowingly agreed upon. It is remarkable indeed that a party to a contract may be liable in tort to another party thereto, with respect to a matter explicitly covered by the contract, even though the contract has been strictly followed by the first party. Defendant suggests that where parties within an industry agree upon rules to be followed, one party within that industry ought not to be allowed to attack those rules in litigation with another industry member. Cf. *CRI&P Railroad v. CB&Q*, 437 F.2d 6, 10 (7th Cir. 1971). The use of the solid bearing design in 1969 on repaired (or even rebuilt) 70 ton covered hopper cars was a design use which plaintiff fully understood and to which it had agreed in writing. It now claims that its agreement may be unilaterally abrogated by it in litigation with another railroad. Plaintiff agreed to abide by all the interchange rules, and as a party to those rules has had the benefit of interchange with CB&Q and its successor BN concerning the delivery, receipt, and use of each other's rolling stock. Plaintiff has accepted the benefits of the rules, but now refuses to accept its correlative responsibilities. The appellate court correctly declined to let that refusal occur. Its decision should stand.

Based on the foregoing, as well as on the discussion contained in the appellate court's opinion (*see infra*, pp. 48-50), that court's reversal of the circuit court's judgment on negligence was correct and does not present an issue of law of sufficient importance to warrant allowance of plaintiff's petition.

III.

The Appellate Court Correctly Ruled As A Matter Of Law That The Solid Bearing Design Cannot Be Deemed "Unreasonably Dangerous" As Between Railroads, The Only Users Of Railroad Cars.

The only alleged "unreasonably dangerous" condition in car CB&Q182544 involved in this case was one of design, *viz.*, that the car was equipped with solid bearings rather than with roller bearings (A. 165). The evidence established, however, that continued use in 1969 of a solid bearing design rather than a roller bearing design on repaired 70 ton covered hopper cars cannot, of itself, result in an unreasonably dangerous condition for purposes of strict liability in litigation between railroads.

Section 402A of the Restatement (2nd) of Torts imposes liability on the seller of a product if such product is "in a defective condition unreasonably dangerous to the user . . . ." Section 402A states the law of Illinois. *Suvada v. White Motor Co.*, 32 Ill.2d 612, 210 N.E.2d 182 (1965). The Restatement explicitly provides that a product cannot be considered unreasonably dangerous to the user when the risk-posing condition is fully contemplated and understood by the user. Thus, Comment i. under § 402A expounds unreasonably dangerous as follows:

> "The rule stated in this Section applies *only* where the defective condition of the product makes it unreasonably dangerous to the user or consumer . . . . *The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.*" (Emphasis supplied).

Comment g. under § 402A, quoted by the appellate court below, provides:

> "The rule stated in this Section applies *only* where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." (Emphasis supplied)

In the present case, the trial court defined "unreasonably dangerous" as follows:

> "When I use the term 'unreasonably dangerous' in these instructions, I mean a hazard of which the railroad user of the railroad car was not aware and a danger beyond the expectation of the ordinary railroad user with the ordinary knowledge common to the railroad industry." *Defendant's Instruction* No. 14. (R. 1770; A. 160).

Such definition is supported by *Huebner v. Hunter Packing Co.*, 59 Ill. App. 3d 563, 16 Ill. Dec. 766, 769 (5th Dist., 1978); *Troszynski v. Commonwealth Edison Company*, 42 Ill. App. 3d 925, 356 N.E.2d 926, 928-29 (1st Dist. 1976); *Becker v. Aquaslide 'N' Dive Corp.*, 35 Ill. App. 3d 479, 341 N.E.2d 369 (4th Dist., 1975); *Denton v. Bachtold Bros., Inc.*, 8 Ill. App. 3d 1038, 291 N.E.2d 229 (4th Dist. 1972), *Mullen v. General Motors Corp.*, 32 Ill. App. 3d 122, 336 N.E.2d 338, 345 (1st Dist. 1975).

Furthermore, this Court has recently utilized the Restatement's rationale of "unreasonably dangerous" as well, in *Hunt v. Blasius*, 23 Ill. Dec. 574, 384 N.E.2d 368, 372 (1978). In *Hunt*, this Court said in ruling a sign post not unreasonably dangerous as a matter of law:

> "A manufacturer is not under a duty in strict liability to design a product which is totally incapable of injuring those who foreseeably come in contact with the product. Products liability does not make the manufacturer an insurer of all foreseeable accidents which involve its product. Virtually any product is capable of producing injury when put to certain uses or misuses . . . Injuries are not com-

> pensable in products liability if they derive merely from those inherent properties of a product which are obvious [or well known] to all who come in contact with the product. (*Genaust v. Illinois Power Co.*, (1976), 62 Ill.2d 456, 467, 343 N.E.2d 465.) The injuries must derive from a distinct defect in the product, a defect which subjects those exposed to the product to an *unreasonable* risk of harm. The Restatement (Second) of Torts concludes that strict liability applies only when the product is 'dangerous to an extent *beyond* that which would be contemplated by the ordinary [person] . . . , with the ordinary knowledge common to the community as to its characteristics.' (Emphasis added.) Restatement (Second) of Torts, sec. 402A, comment i (1965)." Accord, I.P.I.2d, 1977 Supplement, at page 10.

This Court further observed in *Hunt* as follows:

> "In the case at bar, plaintiffs have alleged no legally cognizable defect in the sign post. They have merely indicated a preference for 'break-away' posts. However valid that preference might be, the availability of an alternative design does not translate into a legal duty in products liability. An action is not maintainable in products liability merely because the design used was not the safest possible."

Evidence at trial established conclusively that plaintiff was fully aware of the characteristics of the solid bearing design insofar as hotboxes are concerned. Several of plaintiff's employees testified that hotboxes in rolling stock were not uncommon (A. 192, 203-04), and that plaintiff's rules required its operating employees to be constantly alert for them. Moreover, plaintiff introduced a list of 159 solid bearing hotboxes covering a period of 5 years from 1965-70 (Pl. Ex. 90; BE 11). Thus, plaintiff was fully aware of the risk here involved in the use of cars with solid bearings. Indeed, prior to

the Crescent City derailment, it was actively considering the installation of automatic surveillance devices to more readily detect its hotbox occurrences. (A. 552-59).

Under facts showing far less knowledge on the part of railroads of a claimed "unreasonably dangerous" condition than that proven here, the United States Court of Appeals for the Eighth Circuit held that such a condition had not been established. *St. Louis-S.F.Ry. Co. v. Armco Steel Corp.*, 490 F.2d 367 (8th Cir. 1974), *affirming* 359 F.Supp. 760 (E.D. Mo. 1973); *cert. den.*, 417 U.S. 969 (1974). *Armco Steel* arose out of the derailment of one of the plaintiff's (Frisco's) trains which resulted in a loss of $745,000.00. The derailment was caused by the failure of a wheel manufactured and sold by Armco to Pullman. Pullman, in turn, mounted the wheel on a railroad car and sold the car to Trailer Train Company. That corporation leased the car to various railroads, including Frisco.

Frisco based its action against Armco and Pullman (a steel company and a commercial car manufacturer—not another railroad party to the AAR interchange rules) on strict liability. The trial court concluded, however, that the plaintiff was not entitled to recover because the wheel was not sold by Armco in a "defective condition unreasonably dangerous to the user or consumer . . . ." in that the plaintiff had fully contemplated all the characteristics of the wheel. The trial court reasoned and held:

> " 'By 'unreasonably dangerous' [it] is meant that the product must be dangerous to an extent beyond that contemplated by those having the ordinary knowledge of the community as to the characteristics of the product. *Railroads, including, of course, the plaintiff railroad, are the sole ultimate purchasers and users of railroad cars and wheels*

and the Court finds that Frisco fully contemplated all of the characteristics of the wheel in question and that the wheel was neither defective nor unreasonably dangerous.' " 490 F.2d at 369, quoting from opinion of trial court. (Emphasis supplied).

Frisco argued on appeal that the trial court's finding that the wheel was not unreasonably dangerous was clearly erroneous. The court of appeals rejected that contention and further affirmed the trial court's view on the meaning of unreasonably dangerous:

> "Frisco is not in the position of an unwary railway passenger. It is a company actively participating in the development of AAR specifications.
>
> * * * * *
>
> "Frisco is, in effect, urging this Court to go beyond the doctrine of strict liability and hold that Armco is an insurer and, thus, responsible in damages to a railway company whenever one of its wheels fails. We respond negatively to the urging." 490 F.2d at 369-370.

Since the only claim of plaintiff in our case concerns a design matter; *viz.* using solid bearings on CB&Q182544 instead of roller bearings (A. 165-70), and no physical manufacturing flaw is in issue (A. 492), the rationale of *Armco Steel* is even more compelling here. In *Armco Steel*, the trial court found that the wheel met AAR specifications. Similarly, there was no evidence in this case showing that the bearing or journal box components here involved were in any manner defective in a physical or manufacturing sense, and plaintiff's only expert explicitly eschewed such a claim (A. 492). Plaintiff, like the Frisco, is a company which has affirmatively bound itself to AAR rules and specificaitons and has agreed with other railroad owners of freight cars to allow the solid bearing design to be used in interchange service.

To sustain plaintiff's strict liability verdict in this case would, as noted in *Armco Steel* and by the appellate court below, "go beyond the doctrine of strict liability and [to] hold that [defendant] is an insurer and, thus, responsible in damages to a railway company whenever one of its [solid bearings] fails."* Accord: *Denton v. Bachtold Brothers, Inc.*, 8 Ill. App. 3d 1038, 291 N.E.2d 229 (4th Dist. 1972) (leave to appeal denied, Ill. lv. to app. tb., p. 41); *Orfield v. International Harvester Co.*, 535 F.2d 959 (6th Cir. 1976), affirming 415 F.Supp. 404 (E.D. Tenn. 1975); *Scheller v. Wilson Certified Foods, Inc.*, 559 P.2d 1074 (Ariz. App. 1976).

The design cases cited in support of plaintiff's position on "unreasonably dangerous" on pp. 20-22 of its petition are inapposite. In none of those cases was plaintiff a sophisticated corporation with intimate knowledge of the characteristics of such designs *or* the care, inspection, and surveillance they needed. In none of those cases was an existing design used throughout an industry simply retained on a machine repaired by its owner-user, *pursuant to agreement of all parties to the litigation*. Plaintiff's cases, rather than supporting its position here, simply typify situations in which the strict tort doctrine may call for liability.

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* That *Armco Steel* involved a reviewing court's determination that a trial court's findings were not clearly erroneous is not sufficient to distinguish that case from the present one, for there is *no* evidence in this record from which one may properly conclude that the TP&W was (1) not aware that CB&Q182544 was equipped with solid bearings, (2) unaware of not uncommon occurrences of hotboxes in solid bearing rolling stock (indeed, plaintiff says it was constantly on the alert for them), and (3) not a party to rules which specifically approved the use of such bearings on cars such as CB&Q-182544. The facts of the present case are *much* stronger than those in *Armco Steel* with respect to the absence of the requisite unreasonably dangerous condition.

The suggestions by plaintiff that defendant retained the use of "obsolete" equipment in 1969 are belied by the fact that there were over 1,000,000 solid bearing railroad cars in use in 1971 by the American railroad industry, more than a year after the subject accident, and that design was still being used at the time of trial. Of the 640 cars owned by *plaintiff* in 1970, 85% were of the solid bearing design. Further, there was no evidence that any railroad in a repair program such as the one before this Court had ever converted its cars from solid bearings to roller bearings.

Plaintiff states (pet. p. 21), without record support, that ". . . the evidence showed that the use of an alternative design (roller bearings) would significantly reduce hotbox occurrences *from all causes*." That is not correct. Dr. Rhine testified without contradiction that roller bearings are just as likely to suffer damage (and resultant failure) from longitudinal impacts (which occur during rough handling) as solid bearings (A. 590). Damage done to solid bearing components is, however, more easily detectable on inspection (A. 590-91; 613). See pl. ex. 151 (BE 41), where an AAR committee report notes "with alarm" the number of unaccounted for *roller bearing* hotbox failures (pl. ex. 151, p. 2), and the testimony that roller bearings were themselves undergoing an evolution in design to reach acceptable reliability (A. 612). In fact, plaintiff's worst hotbox incident prior to Crescent City involved a roller bearing (A. 556).

Plaintiff makes the extraordinary contention (pet. p. 22) that this Court should now consider the "unidentified defect" holding in *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill.2d 570, 357 N.E.2d 449 (1976), as a legal theory in support of the jury's verdict, even though the jury was never instructed on that theory due to its rejection by

the trial court as without record basis (A. 703-710). Plaintiff cites no decisional law that an appellate tribunal may affirm a judgment founded on a jury verdict on the basis of a theory of recovery never before that jury. Nor does it exist. A party may defend a judgment on review on a legal theory not relied on (or allowed to be relied on) at trial only where that theory involves a question solely of *law* rather than additional determinations of *fact*. *UFITEC, S.A. v. Carter*, 20 Cal.3d 238, 571 P.2d 990 (1977); *see also, People ex rel. Sterba v. Blaser*, 33 Ill. App. 3d 1, 337 N.E.2d 410, 416 (1st Dist. 1975). Here, a judgment on the jury verdict could be sustained on the basis of *Tweedy* only if it had been properly determined as a matter of *fact* by the jury that car CB&Q182544 possessed in February, 1969, an unidentified defect attributable to defendant which caused the hotbox of June 21, 1970. That matter, however, was not before the jury. *See Nelson v. Union Wire Rope Corporation*, 31 Ill.2d 69, 199 N.E.2d 769, 792 (1964).

Tweedy is inapplicable in any event. While Dr. Rhine testified that solid bearings could last for 1.5 million miles, his view was based upon an assumption of adequate handling, inspection, and maintenance (A. 597). Plaintiff adduced no evidence whatever on handling of car CB&Q182544 while it was in the hands of some 20 different railroads (including eleven times with plaintiff (Pl. Ex. 40)) during the period between February, 1969, and June 18, 1970. Beyond that, it also failed to account for the car while in the hands of the P&PU and failed to negate its own abnormal use of the car as a cause of the hotbox in question.

Plaintiff's position in this case represents a revolutionary theory which, if sustained, has boundless

implications. Its precedent could not be confined to the repair of railroad freight cars. The ruling would spread to *all* activiites involving repairs, imposing a liability exposure on owner-users of existing manufactured goods and those engaged in the business of repairing. It would apply to virtually every manufactured article or component in existence. Presumably the proposed duty would be triggered each time a new design came on the market and a repair followed. Carried to its logical extreme, a bias ply tire may no longer be repaired or replaced in kind, even pursuant to knowledgeable agreement. It must be replaced by a new steel-belted tire, or perhaps a newer still elliptical tire. Practically speaking, we question whether many of the nation's railroads and many repair businesses in this state could long survive the remarkable liability plaintiff here seeks to create.

Plaintiff has cited no case, in either strict liability or negligence, where recovery was allowed as a result of continued use of a design, already in existence on a machine, where that design was not only long-standing and pervasive within an industry but also had been knowingly approved in an agreement by the very party attempting to fault its use.

IV.

The Appellate Court Correctly Ruled That Plaintiff Assumed The Risk As A Matter Of Law.

Plaintiff argues that the appellate court failed to adhere to the *Pedrick* standard in ruling in favor of defendant on assumption of risk because of the existence of only "ample" evidence in support of plaintiff's complete knowledge of the alleged risk-posing condition. While the appellate court's "ample evidence" language

was used in connection with "unreasonably dangerous" (385 N.E.2d at 940) and not, as asserted by plaintiff, on assumption of risk, it is clear that the court, given the record before it, could just as properly have utilized the term "uncontradicted", "overwhelming", or "undisputed". Its use of the term "ample" is but an understatement and is of no moment as respects the validity of its ruling, on "unreasonably dangerous" *or* assumption of risk.

Assuming *arguendo* that retained use in 1969 of the solid bearing design could have rendered car CB&Q182544 "unreasonably dangerous" to a railroad plaintiff and that such design condition was a proximate cause of the derailment, the evidence nonetheless established that plaintiff knew that the car was equipped with solid bearings at the time it voluntarily accepted the car in interchange and was also fully aware that hotboxes might occur in the use of cars so designed.

In the trial court plaintiff's counsel attempted to negate defendant's assumption of the risk defense in only one way—by pointing out that on two occasions subsequent to February, 1969, but prior to the incident in question, certain bearings and springs at other than the L-4 position on car CB&Q182544 broke and were replaced (R. 1643-44).* He argued that since plaintiff had no knowledge of those incidents (R. 1644, 1710), it could not have assumed the risk of "defective" bearings in the car. However, that argument missed the point as it in no way negates plaintiff's assumption of the risk posed by

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* The fact that these defects were discovered, and repaired, constitutes important evidence that the interchange system, with its responsibility placed on the handling road does in fact work, and should not become a victim of the subrogation process.

the only alleged "unreasonably dangerous" condition charged. There was no showing whatever that the bearing breakage adverted to by plaintiff's counsel implied the existence in February, 1969, of some unidentified physical defect in the L-4 bearing assembly on car CB&Q182544. Indeed plaintiff's only expert explicitly disclaimed the existence of any "physical flaw" in the L-4 bearing assembly (A. 492). Furthermore, the trial court correctly refused to accept plaintiff's contention that the evidence supported a charge that an "unidentified" defect existed in car CB&Q182544 at the time it left the repair shop in February, 1969 (A. 703-710). The case was sent to the jury (over defendant's persistent objection) on one charge of defect; *viz.* solid bearing design v. roller bearing design, and that design risk is the risk which plaintiff railroad assumed as a matter of law. See *Kinka v. Harley-Davidson Motor Company, Inc.*, 36 Ill. App. 3d 752, 344 N.E.2d 655, 661 (1st Dist. 1976).

It was established beyond doubt that plaintiff accepted car CB&Q182544 in interchange, *after inspection*, and with full knowledge that the car was equipped with solid bearings. Plaintiff has never challenged that position. Thus, notwithstanding its knowledge that the car in question was equipped with solid bearings, which plaintiff charges was an unreasonably dangerous design *per se*, and despite its knowledge that such design was on occasion subject to hotboxes, plaintiff accepted the car in interchange and proceeded to use (indeed, misuse) it in railroad service.* On interchange acceptance, plaintiff's witness Danahy, of the AAR, testified that the prerogative of accepting or rejecting a car rests with the receiving railroad. (A. 446, 450-51).

* The strange contradiction between plaintiff's litigation position on this bearing design and its continuous ownership and tender and receipt in interchange of cars similarly equipped down to the day of trial, has never been addressed by plaintiff.

Assumption of risk was established as a defense to strict liability claims in *Williams v. Brown Manufacturing Company*, 45 Ill.2d 418, 261 N.E.2d 305 (1970) when this Court adopted the following rule:

> ". . . [a] plaintiff who knows a product is in a dangerous condition and proceeds in disregard of this known danger (often termed 'assumption of risk') may not recover for resulting injuries. . . ." (45 Ill.2d at 426, 261 N.E.2d at 309)

In stating that assumption of risk was "ordinarily a question to be determined by the jury" (261 N.E.2d at 312), the Court recognized that on occasion the matter could become a question of law. And since the decision in *Williams*, a number of Illinois courts have indeed held in products cases that plaintiffs have assumed risks as a matter of law. See e.g. *Denton v. Bachtold Bros., Inc.*, 8 Ill.App.3d 1038, 291 N.E.2d 229 (4th Dist. 1972); *Ralston v. Illinois Power Co.*, 13 Ill.App.3d 95, 299 N.E.2d 497 (4th Dist. 1973); *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973); *Fore v. Vermeer Manufacturing Co.*, 7 Ill.App.3d 346, 287 N.E.2d 526 (3rd Dist. 1972).

There can be no dispute that plaintiff (1) had actual knowledge of the danger involved, (2) understood and appreciated the risk; *viz.* it knew that car CB&Q182544 was equipped with solid bearings and it knew that solid bearings were occasionally subject to hotboxes, which if ignored, would result in journal burnoffs (See *Bronston v. Club Comanche, Inc.*, 286 F.Supp. 21, 23 (D.C. V.I. 1968), and (3) voluntarily exposed itself to such risk; *viz.* it accepted the car in interchange and used it in railroad service.

Plaintiff is not an unsophisticated consumer. Rather, it is an entity having particular knowledge and un-

derstanding of railroad cars.* It not only maintained repair tracks (A. 545, 563), but also employed personnel who could repair solid bearing cars as well as repair *and install* roller bearings (A. 563). It would ill befit plaintiff to argue that it knew nothing about solid bearings and related components, as well as their proclivities. Indeed it has made no such contention, and Mr. Polich and other TP&W personnel testified extensively on plaintiff's intimate knowledge of solid bearing rolling stock, hotboxes, hotbox detection devices, etc. (see, *e.g.*, A. 552-59). If there was ever a case where a plaintiff fully knew about an alleged "unreasonably dangerous" design and the risk it posed, this is it.

Plaintiff discusses cases which purportedly hold that a plaintiff does not assume a risk when he vaguely recognizes a "general possibility" of danger. Of the two Illinois decisions cited (pet. pp. 23-24) *Christopherson v. Hyster Co.*, 58 Ill.App.3d 791, 374 N.E.2d 858 (1st Dist. 1978) did not deal with assumption of risk and was decided under Wisconsin's comparative fault doctrine. In the other, *Karabatsos v. Spivey Co.*, 49 Ill.App.3d 317, 364 N.E.2d 319 (1st Dist., 1977), the court held that the plaintiff could have been completely unaware of the possibility of injury in doing what he did at the time of the accident (364 N.E.2d at p. 322).

Plaintiff attempts (pet. pp. 23-24) to restrict its charge of an "unreasonably dangerous" condition to the par-

* The importance of taking into consideration the plaintiff's age, experience, knowledge and understanding in connection with an assumption of risk defense was recently emphasized in *Troszynski v. Commonwealth Edison Co.*, 42 Ill.App.3rd 925, 356 N.E.2d 926 (1st Dist. 1976), where it was shown that the plaintiff lacked experience with and knowledge of the danger of an electrical meterbox. Plaintiff's relative unsophistication was also stressed in *Sweeney v. Max A. R. Matthews & Co.*, 46 Ill.2d, 264 N.E.2d 170 (1970), where this Court refused to hold that plaintiff had assumed a risk as a matter of law.

ticular 1969 bearing installation on car CB&Q182544, while on pp. 19-22, on "unreasonably dangerous", it speaks solely of "design" (except as respects *Tweedy*, which is inapplicable). Plainly stated, this is a "design" case. In *Prince v. Galis Manufacturing Co.*, 58 Ill.App.3d 1056, 374 N.E.2d 1318 (3d Dist. 1978) (leave to appeal denied, Ill. lv. to app. tbls. at p. 66), a "design" case, a coal miner was injured when a wrench flew out of a roofbolter machine. There were no wrench retainers on machines manufactured by the defendant, but they existed on similar machines of another. The plaintiff, however, was aware that no retainer existed on his machine and he knew that, in its absence, wrenches could *on occasion* fly out. The appellate court properly held that the plaintiff had assumed the risk as a matter of law.* The facts here are much stronger on assumption of risk than those in *Prince*. See also *Waegli v. Caterpillar Tractor Co.*, 251 N.W.2d 370 (Neb. 1977).

Plaintiff argues that it was "obligated" to accept 70 ton solid bearing covered hopper cars. That is contrary to the evidence, as shown *supra*, p. 45. Even if plaintiff *were* "obligated" to accept such cars, however, that was by its consensual agreement (B.E. 89), and an obligation under an agreement is not "involuntary" in any event. For example, an employee cannot argue involuntariness by asserting that his employer required (pursuant to agreement between the parties) the use of an allegedly "unreasonably dangerous" machine. *Fore v. Vermeer Manufacturing Co.*, 7 Ill. App. 3d 346, 287 N.E.2d 526, 528 (3d Dist. 1972); *Ralston v. Illinois Power*

* In *Prince*, the appellate court also appropriately observed that ". . . contrary to plaintiff's assertions, the law of strict liability is not the equivalent of absolute liability. A manufacturer is not an absolute insurer of its product as to all injuries resulting from contact with or use of the product." 374 N.E.2d at p. 1321.

Company, 13 Ill. App. 95, 299 N.E.2d 497, 499 (4th Dist. 1973).

Plaintiff finally asserts that even if its acceptance of solid bearing 70 ton covered hopper cars was "voluntary", it was nonetheless not "unreasonable".* However, if car CB&Q182544 was "unreasonably" dangerous in February, 1969 simply because it was equipped with solid bearings (which, again, constitutes plaintiff's entire case), plaintiff knew that it was so equipped and also knew of the hotbox "hazard" involved. A party who accepts and uses an "unreasonably" dangerous instrumentality, knowingly disregarding the "unreasonable" danger, acts "unreasonably" in proceeding with its use. *Fore v. Vermeer Manufacturing Co.*, 287 N.E.2d at p. 528.

V.

The Authorities Cited By The Appellate Court Compel A Rejection Of The Jury Verdicts.

As respects the negligence count, the appellate court cited *Watts v. Bacon & Van Buskirk Glass Co.*, 18 Ill.2d 226, 163 N.E.2d 425 (1956) for the proposition that defendant had committed no negligence as to plaintiff in repairing car CB&Q182544 and retaining its solid bearing design. *Watts* arose out of an accident in which a plaintiff was injured by shattering glass in the door of a

* In Illinois, voluntary and knowing use of an unreasonably dangerous item is sufficient for a showing of assumption of risk, without any further showing that such use was also "unreasonable." Thus, in *Sweeney v. Matthews & Co.*, 46 Ill.2d 64, 66, 264 N.E.2d 170, 171 (1970), this Court said that to establish assumption of risk, the defendant must show that "the plaintiff knew the product was in a dangerous condition and proceeded to use the product in disregard of this known danger." See also the new I.P.I. instruction on assumption of risk, where the term "unreasonable" is notably absent. I.P.I.2d 400.03 (1977 Supplement).

drug store. The glass was plate glass, which was shown to be less "safe" than tempered glass, which was available.

This Court, affirming a directed verdict for the glass supplier, said:

> "There was no evidentiary basis to sustain a jury verdict that the glass company was negligent in supplying installing plate rather than tempered glass. It is true that tempered glass would be safer, and presumably doors of stronger materials would be still safer, but a supplier of chattels should not be compelled to sell only the ultimate in materials. In the case at bar, the defendant supplied and installed the plate glass chosen by its customer. There is no evidence that this glass was inherently dangerous; that it was negligently installed; that it was defective; or that it was not reasonably safe or not customarily used." 18 Ill.2d at 232.

Under *Watts*, even if roller bearings are "safer" than solid bearings insofar as hotbox propensities are concerned, CB&Q was nonetheless under no duty *to plaintiff* to change bearing designs during the February 1969 repairs.* As in *Watts*, there has been no evidence here

* In this connection, the *Watts* Court notes that the plate glass there in question had been chosen by the defendant's customer. In the present case, it may fairly be said that solid bearings were chosen and approved by both plaintiff and defendant under the Interchange Rules—rules on which plaintiff had presumably voted, rules which plaintiff's owners helped promulgate, and rules by which plaintiff had agreed to be bound. Where a product is properly manufactured pursuant to plans and specifications provided and agreed to by the customer and such plans and specifications are not so obviously dangerous that they could not be reasonably followed, liability for a claimed design "defect" does not obtain. *Hunt v. Blasius*, 23 Ill.Dec. 574, 384 N.E.2d 368 (1978); *Spangler v. Kranco, Inc.*, 481 F.2d 373, 375 (4th Cir. 1973); *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 376 A.2d 88, 90 (Del. Supr. 1977); Restatement (2d) of Torts, Sec. 404, Comment (a).

that the particular solid bearings on CB&Q182544 were inherently dangerous, defective, or unreasonably dangerous in any physical sense (A. 492). Furthermore, the evidence shows that the solid bearing design was in substantial use in 1969 and the time of trial. (A. 288-89). For other examples of the *Watts* concept, see *Day v. Barber-Colman Co.*, 10 Ill. App. 2d 494, 508, 135 N.E.2d 231, 238 (2nd Dist. 1956), *Cardullo v. General Motors Corporation*, 378 F.Supp. 890 (E.D.Pa. 1974), aff'd 511 F.2d 1392 (3d Cir. 1975), *Warner v. Kewanee Machinery & Conveyor Company*, 411 F.2d 1060 (6th Cir. 1969); *United States Rubber Company v. Bauer*, 319 F.2d 463 (8th Cir. 1963).

With respect to the strict liability count, the appellate court relied in significant part on *St. Louis S.F.R.R. v. Armco Steel Co.*, 490 F.2d 367 (8th Cir., 1974) for the proposition that the solid bearing design cannot be deemed unreasonably dangerous to a plaintiff railroad. As shown in section III of this argument, the facts of *Armco* were substantially weaker in favor of the defendant than are those in the present case. Its rationale, which is totally consistent with the concept of unreasonably dangerous as envisaged by § 402A of the Restatement of Torts (2d), is *a fortiori* applicable here in favor of a finding of no unreasonably dangerous design condition as respects railroads, the only users of railroad cars, as a matter of law.

The appellate court also cited *Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900 (9th Cir., 1978), a case standing, *inter alia*, for the proposition that "the highly specialized industry-use interchange program to be found in this case is too dissimilar to the commercial distribution of a product to warrant the [strict tort liability] doctrine's application." The *Torres*

court found that to be the law even if Arizona courts would apply strict liability generally to commercial lessors. Resolution of that question was deemed unimportant to the court's determination (584 F.2d at 902). While defendant believes that *Torres* is correct, and that strict liability ought not apply in this case (see section VI, *infra*), even if the strict liability doctrine does apply here, plaintiff completely failed to prove a case thereunder and, moreover, assumed the risk of the claimed unreasonably dangerous condition in any event. Thus, whatever merit be ascribed to *Torres*, the appellate court's ruling that plaintiff cannot recover from defendant in the instant case is correct and should not be disturbed.

VI.

The Appellate Court's Opinion Does Not Offend Constitutional Guarantees Of Due Process And Equal Protection Of The Law; Under The Facts Here Present, Strict Liability Does Not Apply.

Plaintiff contends that the appellate court's comment that strict liability should not apply in litigation between two railroads as respects the interchange of rolling stock violates constitutional principles of due process and equal protection of the law.* While, as shown in sections III and IV *supra*, the appellate court correctly ruled for defendant *assuming* doctrinal application of strict liability, plaintiff's constitutional contentions are of no merit in any event.

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* In light of the substantive rulings on strict liability made by the appellate court, it is questionable whether its reference to *Torres v. Southern Pacific Transportation Co.*, 584 F.2d 900 (9th Cir. 1978) even constitutes a holding that the strict liability doctrine does not here apply. Indeed, plaintiff itself does not characterize the appellate court's *Torres* language as a "holding" (See pet. p. 14).

When this case was initially filed defendant contended, and still contends, that the strict liability doctrine had no application here. It hardly offends the constitution for a court to rule that the interchange of railroad cars is vastly different (as between railroads *inter se*) from the commercial distribution of products, and to use that difference as a basis for excluding the application of strict liability between interchanging railroads. Different facts and circumstances ofttimes call for different rules of law. See, e.g., *Immergluck v. Ridgeview House, Inc.*, 53 Ill. App. 3d 472, 368 N.E.2d 803 (1st Dist. 1977). The question presented is one of the validity of the judgment under substantive tort law—not a question of constitutional magnitude. *Maupin v. Maupin*, 403 Ill. 316, 319, 86 N.E.2d 206 (1949); *Merlo v. Public Service Co.*, 381 Ill. 300, 309, 45 N.E.2d 665 (1943).

Count I of the amended complaint seeks to impose strict liability on defendant on the basis that its predecessor CB&Q "rebuilt" car CB&Q182544 in February, 1969, and that the "rebuilding" process rendered the car unreasonably dangerous because it was not converted to roller bearings. However, the criteria underlying the use of the strict liability doctrine are not here present even if car CB&Q182544 was "rebuilt" by the CB&Q. Absent such criteria, the doctrine can have no application. Cf. *Lowrie v. City of Evanston*, 50 Ill. App. 3d 376, 365 N.E.2d 923 (1st Dist. 1977).

It is seen from the first case to apply strict liability to products generally, *Greenman v. Yuba Power Products*, 59 Cal.2d 67, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), that a substantial policy premise justifying the doctrine's use is that manufacturers and others in the original chain of distribution of products know, or should know, that

articles placed by them in the stream of consumer commerce will be used or consumed without inspection by entities or people who, lacking expertise, cannot be expected to ascertain the existence of defects. In recognizing that factor as in large part justifying the adoption of a doctrine calling for liability without proof of negligence, the *Greenman* court held:

> ". . . [a] manufacturer is strictly liable in tort when an article he places on the market, *knowing that it is to be used without inspection for defects, proves to have a defect that causes injury. . . .*"
>
> ". . . The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons *who are powerless to protect themselves. . .*" (27 Cal. Rptr. at pp. 700, 701) (Emphasis supplied)

Likewise, in *Santor v. A. and M. Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305, 311-12 (1965), the New Jersey Supreme Court, in adopting strict liability in that state, justified its holding as follows:

> ". . . *[T]he great mass of the purchasing public has neither adequate knowledge nor sufficient opportunity to determine if articles bought or used are defective. Obviously they must rely upon the skill, care and reputation of the maker. . . .*" (Emphasis supplied)

Under that rationale, courts have held that liability for injury caused by products, if they are unreasonably dangerous, should rest with those best able to assure the absence of defects therein; namely, those within the chains of distribution involved. (See Anno., *Products Liability: Strict Liability In Tort*, 13 ALR3d 1057). Thus, Section 402A of the Restatement of Torts, 2nd, which this Court adopted in *Suvada v. White Motor Co.*,

32 Ill.2d 612, 210 N.E.2d 182 (1965), contemplates a *special* liability to be imposed upon a seller of a product for physical harm caused a user or consumer by unreasonably dangerous product conditions.

Since the rule embodied in Section 402A of the *Restatement of Torts, 2d*, states the law of Illinois (*Suvada*), comments to that rule made by its drafters are important evidence of its scope. That the rule was not intended to apply in situations other than within the chain of product distribution to the consuming public (by sale, lease, etc.) is amply demonstrated by comments c. and f. to Section 402A.

Defendant's position on this point is further substantiated by comment n., where it is asserted that "[c]ontributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. . . ." In nullifying that aspect of contributory negligence as a bar to recovery, the drafters of the *Restatement* necessarily contemplated that those entities who are *entitled to expect*, because of legal duties owed them, that their "products" will be inspected by their ultimate users, should not be strictly liable to such a user, for in cases where all parties involved, including the complainant, are under an affirmative duty to inspect and to correct defects, it is entirely unwarranted to abrogate the contributory negligence defense and allow a party to recover damage from another notwithstanding its own culpability. That is particularly true in the railroad industry where public policy has placed heavy responsibilities on handling carriers, and where, as shown below, the integrity of the interchange system absolutely *requires* inspection, surveillance, and maintenance of

rolling stock by the handling railroad. Cf. *Galveston, H. & S.A. Ry. Co. v. Nass*, 94 Tex. 255, 59 S.W. 870-871 (1900).

Rule 1 (A. 26) of the Association of American Railroads' *Interchange Rules* (Def. Ex. 8), by which both parties in the present case are bound, places a legal duty of inspection and maintenance on receiving railroads. That rule reads:

> "Care of Foreign Freight Cars"
>
> "Rule 1. (a) Each railroad is responsible for the condition of all cars on its line, and must give to all equal care as to inspection and lubrication."

For cases which deal with such duty, see *Alabama Great Southern R. Co. v. Allied Chemical Corp.*, 501 F.2d 94, 99, fn. 3 (5th Cir. 1974) *aff'd en banc*, 509 F.2d 539 (5th Cir. 1975); *Chicago & Northwestern Ry. Co. v. Chicago, R.I. & P.R. Co.*, 179 F.Supp. 33 (N.D. Ia. 1959). *aff'd* 280 F.2d 110 (8th Cir. 1960); *Galveston, H. & S. Ry. Co. v. Nass*, 94 Tex. 255, 59 S.W. 870 (1900); *Rylander v. Chicago Short Line Ry. Co.*, 19 Ill. App. 2d 29, 45, 153 N.E.2d 225, 232-33 (1st Dist. 1958), *aff'd* 17 Ill.2d 618, 161 N.E.2d 812 (1959).

Strict liability simply has no place in actions between railroads as to interchange of rolling stock because the receiving road is under a contractual *and common law* duty to discover and correct defects in such rolling stock. That defendant in 1969 repaired, or even "rebuilt", the car in question has no bearing on whether that position is sound. The AAR rules require each railroad to assume the same responsibility for the soundness of *all* cars on its line, whether owned by it or not, or whether repaired or "rebuilt" by it or not, if they are accepted following an interchange inspection. Application of strict liability here would precisely *reverse* that concept.

That strict liability should not apply in cases where its use would relieve the plaintiff of duties otherwise imposed by law is demonstrated by *Hutter v. Badalamenti*, 47 Ill. App. 3d 561, 362 N.E.2d 114 (5th Dist. 1977). There, the appellate court refused to apply the doctrine against an operator of a restaurant-lounge concerning a slippery substance on a dance floor, in part because to do so would require the court to ". . . ignore plaintiff's responsibilities for her own safety. . . .", which responsibilities are mandated under applicable law relating to personal injury actions against possessors of land. (362 N.E.2d at pp. 116-17). The *Hutter* rationale has singular application here, for if strict liability attaches in this case, plaintiff is essentially relieved of its obligations of inspection, surveillance, correction of defects, etc., all of which, wisely, have long been required of receiving railroads for the protection of the public at large.

As the facts in this case show, to force-fit strict liability where it does not belong, to impose duties of a manufacturer-seller upon activities of freight car interchangers and repairers where user sophistication is the rule, rather than the exception, does nothing but create unnecessary conflicts between salutary public policies.

For example, if recovery under count I is sustained in this case, railroad officials, car inspectors, engineers, conductors, and brakemen in our state will conclude that it no longer matters whether cars are inspected after rough handling in yards, that it's not important to have highly trained and skilled car inspectors, that it's alright to be inattentive to frantic warnings of passers-by, that railroad equipment belonging to another may be abused to the injury of the owner and public but with impunity to the user, and that railroad management

may make operating decisions on train lengths which emasculate the effectiveness of on-train, en route, inspections. Courts should not allow sophisticated users to escape their rightful duties to the public by unnatural applications of strict liability. To hold otherwise is to undermine public confidence in a right of recovery whose proper application, upon proper facts, is both beneficial and wise.

It is not the position of defendant, as intimated by plaintiff on pp. 28-30 and 31-32 of its petition, that the AAR rules or Interchange Agreement prevent suits between railroads or constitute an exculpatory or indemnity contract. That is simply a false issue. The AAR rules contain no exculpatory clause.

Among other points it has developed, defendant contends that operation of the AAR rules and the common law have compelled the rail industry to adopt practices and customs of detailed interchange inspections which are designed and intended in the public interest to force users of rolling stock to discover car damage and malfunctions prior to use. That inspection process, and the public interest it promotes, make the reasons for *strict liability* (and its assumption of *no inspection* prior to use) inoperative.

That the rationale of rule 1(a) is not only relevant, but in most cases, governing, in indemnity actions between interchanging railroads is shown by the fact that its operation typically prevents a receiving railroad which has paid damages to its injured employee from obtaining indemnity from a delivering railroad whose allegedly "defective" car had caused injury. That is so because a receiving railroad, *unlike ordinary users of products in the market place*, is not entitled by practice, custom, or law to assume that an interchanged car is in a safe condition. *Restatement, Restitution*, § 93, comment

c, p. 412. Accord: *Galveston, H. & S.A. Ry. Co. v. Nass*, 59 S.W. 870 (Tex. 1900), where it was held that the public policy of forbidding indemnity in such cases is "sternly imperative", in that a receiving railroad ". . . would [otherwise] be offered an inducement to relax its vigilance in the protection of those who are largely dependent upon it for their safety . . ." (59 S.W. at p. 871). Application of strict liability here would abrogate that rationale which, in fact, was employed by the court in one of the very cases cited by plaintiff (pet. p. 30) to preclude an indemnity claim by a receiving railroad against a delivering line. *Chicago, R.I. & P.R. Ry. Co. v. C&NW*, 179 F.Supp. 33, 61 (N.D. Ia. 1959), aff'd., 280 F.2d 110, 118 (while *contribution*, as opposed to indemnity, was allowed, that was under Iowa law, here inapplicable).

Citing *Maine Central R.R. Co. v. Bangor & Aroostook R.R. Co.*, ... Me. ....., 395 A.2d 1107 (1978), plaintiff implies that the Maine Supreme Court has held proper the application of strict liability as between railroads interchanging cars pursuant to the AAR Interchange Agreement and Rules. That case, however, does not even address the issue.

Following the derailment, allegedly caused by a Bangor & Aroostook car, of a Maine Central train, Bangor & Aroostook, in accordance with AAR rules, initiated arbitration proceedings regarding responsibility for damages caused by the derailment.* Refusing

* In the present case, no such arbitration was required, as plaintiff (and its insurers) *voluntarily* paid for the damage to other railroads' rolling stock, including the very car about which it complains (A. 562-63). Such payments, under AAR rules, are to be made by an operating road whose "unfair usage" and "improper protection" results in the damage in question (BE 56).

to submit to arbitration, Maine Central filed a "products liability" action in state court. The AAR Arbitration Committee found Maine Central, as the recipient railroad, responsible for damage sustained by Bangor & Aroostook cars in the derailment. Bangor & Aroostook sought confirmation of the arbitration award by counterclaim in the state court suit filed by Maine Central. The trial court denied the application, and the Maine Supreme Court reversed.

After reviewing the applicable AAR rules and the Maine Arbitration Act, the court held the arbitration called for by the AAR Rules to be binding and the award to be enforceable. After reaching that conclusion the court addressed the argument that the award should be vacated ". . . because the arbitrators exceeded the powers granted them under the terms of the Interchange Agreement, inasmuch as neither the Agreement nor the Interchange Rules encompass questions of manufacturers' and designers' liability." 395 A.2d at 1122. The court rejected that argument on the ground that the arbitrators did not purport to resolve the issues of "products liability" raised in Maine Central's state court suit. Then, the court said that Maine Central was free to proceed with its suit despite confirmation of the AAR arbitration award.

The court did not, however, address itself to the effect the rationale of the AAR Interchange Agreement and Rules would have on the viability of any theories Maine Central might pursue in its suit. It in no way indicated that Maine Central had a cause of action against Bangor & Aroostook, or under what theory such lawsuit might be pursued. *Maine Central*, therefore, provides *no* authority that strict liability may apply as between railroads interchanging cars under AAR rules. On the

contrary, it holds only that the Interchange Rules, which plaintiff here seeks to avoid, *are valid and enforceable*.

Plaintiff on page 30 of its petition cites *Missouri Pacific Railroad Co. v. Southern Pacific Co.*, 430 S.W.2d 900 (Ct.App. Tex., 1968), for the proposition that a receiving railroad may sometimes obtain indemnity (there under a negligence theory) from a delivering railroad for amounts paid by the receiving road to its employee injured as a result of defects existing in an interchanged car. In that case, however, the receiving railroad, under the Safety Appliance Act, was *absolutely* liable to its injured employee. The court specifically found that the receiving railroad had *not* been guilty of actionable negligence (430 S.W.2d at pp. 903, 905). In the present case, the *only* manner in which plaintiff could have been liable to third parties, for which indemnity is here sought, was as a result of its actionable negligence. *Young v. Toledo, Peoria & Western R. Co.*, 46 Ill.App.3d 167, 360 N.E.2d 978, 980 (3d Dist. 1977); *Hertz v. Chicago, Indiana & Southern R.R. Co.*, 154 Ill.App. 80, 88, 90-91 (2d Dist., 1910); *Restatement of Torts (2d)* § 521 (1977).

Another case plaintiff cites on this point, *Southern Cotton Oil Co. v. Atlantic Coast Line R. Co.*, 17 F.2d 411 (E.D. Va. 1927), didn't even involve an indemnity suit between railroads. The court there simply denied recovery to a car owner where there was leakage of oil from a car furnished by it *where due care had been exercised by the defendant receiving carrier in connection with prevention of the loss.* The court held only that rule 1(a) did not work *absolute liability* upon a receiving railroad. Liability concerning handling of rolling stock was to be determined by the law of negligence, which is

perfectly compatible with the interchange rules. *Southern Cotton Oil* has been discussed by the Illinois Appellate Court:

> "In that case [*Southern Cotton Oil*] there was a loss of merchandise in transit caused by defects in a car owned by the consignor. It was held that the consignor could not recover from the railroad, *but if the loss had been caused by the failure to inspect, or improper handling of the car, then the railroad would [have been] liable. Rylander v. Chicago Short Line Railway Company,* 19 Ill.App.2d 29, 153 N.E.2d 225, 231 (1st Dist., 1958). (Emphasis added.)

Thus, in *Southern Cotton Oil*, even if the car had been leaking, and thus "defective", at the time of delivery by the owner to the defendant, it, as a receiving railroad, would have been liable *to the owner* for the loss had its inspection or car handling been improper. *Southern Cotton Oil* lends no support to the contention that AAR interchange rule 1(a) and its rationale are inoperative in third party indemnity actions between railroads concerning interchanged rolling stock. Indeed, the law is otherwise.

Plaintiff refers to defendant as a "manufacturer" and a "lessor". Defendant is not sued as either, but rather as a railroad company which, in 1969, repaired some of its own rolling stock, and that suit is by another railroad. There are no contentions that car CB&Q182544 contained "defects" in 1946, when it was built, and the trial court prevented plaintiff from attaching strict liability to the mere interchange of rolling stock (A. 685-696). The only theory which went to the jury (over defendant's objection) posited defendant as a "rebuilder" of its own railroad cars in February of 1969.

But not only was defendant a repairer of its own cars, it was also a railroad which, by agreement, had

established with plaintiff and other railroads a relationship contemplating reciprocal use of each other's rolling stock. As a part of that agreement *and under the common law, plaintiff* assumed a primary duty of inspection and correction of "defects" on (as well as generally caring for) cars which come onto its line, regardless of ownership. Plaintiff's management fully understood the function and called this a *service* activity, ancillary to its regular job of railroading (A. 563).

In each of the cases cited by plaintiff on pp. 27-28 of its petition where strict liability was applied, the relationship of the parties was that of commercial product supplier to customer or was a relationship between parties within a vertical chain of product distribution. The relationship between railroads as respects the interchange of rolling stock is radically different and is indeed *sui generis*. Because railroad cars are constantly delivered from one railroad to another, and because freight cars are often in the hands of users other than the owning railroad, the intent and purpose of the Interchange Rules and the common law is to place on the *handling* railroad primary responsibility for inspection, care, and correction of defects on such cars, not only as to the owning railroad, but also as to the public at large. The delivering, or owning, railroad *must* rely upon the competence and care of the receiving road. And that is what Interchange Rule 1(a) is all about. The primary duty is placed upon the handling road—the only feasible place. See *Restatement, Restitution*, § 93, comment (c).

Finally, the policy considerations underpinning strict liability do not apply to the situation where two railroads, parties to industry rules, have agreed upon what is appropriate in connection with the repair of a

car's running gear. The CB&Q, as a railroad owner and user of rolling stock, in 1969 engaged in repairs of its own 300 covered hopper cars, of which CB&Q182544 was one. In repairing those cars, CB&Q complied with all rules promulgated by the AAR, to which plaintiff was a signatory party. The CB&Q did such work as a railroad owner of its own rolling stock, *for its own use* (See *Shook v. Jacuzzi*, 129 Cal.Rptr. 496 (Cal.App. 1976) and, because of the nature of the railroad industry, for the use of other railroads. In no way was the CB&Q "in the business" of marketing "products" which enter the stream of commerce for the use of unsophisticated parties "powerless to protect themselves." See *Avenell v. Westinghouse Electric Corp.*, 41 Ohio App.2d 150, 324 N.E.2d 583, 587-89 (1974). To hold that CB&Q's 1969 repair activity subjects it and defendant, as its successor, to strict liability in this case, in litigation between two railroads, is to improvidently extend the doctrine into an area never envisaged by the courts of Illinois. Defendant submits that such an extension is unwarranted.

VII.

The Appellate Court's Opinion Does Not Conflict With Those Of Other Judicial Districts.

Defendant has already responded to the contentions made on pp. 31-32 of the petition, at pages 57-63 *supra*, and need not restate that material here.

Plaintiff asserts that the opinion below is in conflict with *Rucker v. Norfolk & Western Ry.*, 64 Ill. App. 3d 770, 381 N.E.2d 715 (5th Dist. 1978). Defendant disagrees. In *Rucker*, the defendant GATX was sued in its capacity as a commercial tank car manufacturer, not as an operating railroad which had merely repaired its car

pursuant to an agreement with a plaintiff railroad that the design attacked by the latter could be retained in railroad service. Further, the plaintiff in *Rucker* was a personal representative of a deceased railroader, not a plaintiff railroad which had not only agreed in writing to the use of the design it attacks but also had the opportunity to vote on whether such design was appropriate for interchange service. The principal questions involved in *Rucker* are (1) whether "state of the art" industry standards, either mandatory or customary, are governing or admissible on the question of "unreasonably dangerous" in a strict liability design case, and (2) whether a certain loan receipt agreement should be treated as a covenant not to sue. This Court has allowed petitions for leave to appeal in *Rucker*, and those questions will ultimately be resolved. This Court need not accept this case in order to resolve purported "conflicts" between it and the appellate court's decision in *Rucker*.

VIII.

The Result Reached By The Appellate Court Was Also Correct For Reasons Not Expressed In That Court's Opinion.

As noted in the appellate court's opinion (385 N.E.2d at 940), it discussed only those issues it deemed necessary for its decision. There are, however, other grounds which also required a reversal of the trial court's judgment. Those matters were briefed in the appellate court, and defendant will not deal with them here at length. Suffice it to say that plaintiff failed to prove that its sole expert's hypothesized "weak" bearing even existed in car CB&Q182544 in February, 1969, or at any other time, or that any such "weak" bearing was the cause in fact of the derailment in question (See A.

126-32). Also, the record overwhelmingly established that plaintiff was guilty of misuse as respects count I of the amended complaint (See A. 37-39) and, *a fortiori*, contributory negligence as respects count II (See A. 122-24).

Furthermore, count II fails to state a cause of action for indemnity in that (1) a complaint for indemnity based on negligence can never state a cause when the plaintiff pleads its own due care where if it *was* in the exercise of due care, it could not have been liable to the third party claimants in the first place (Restatement of Torts (2nd) § 521 (1977)); and (2) if plaintiff was liable to third party claimants because of its negligence, that negligence here was necessarily active in nature. *Shulman v. Chrysler Corp.*, 31 Ill. App. 2d 168, 175 N.E.2d 590 (1st Dist., 1961). Furthermore, if plaintiff was guilty of no negligence which proximately caused the derailment, as it claims, it was a volunteer in making payments to third parties and accordingly has no claim for indemnity, having made those payments under no compulsion and without giving prior notice or tendering the defense of such third party claims to defendant. *Alabama Great Southern R. Co. v. Allied Chemical Corp.*, 501 F.2d 94 (5th Cir. 1974), *aff'd en banc* 509 F.2d 539 (5th Cir. 1975).

In addition to the above matters not discussed by the appellate court, defendant has maintained that plaintiff's subrogating insurance carriers, the entities which paid the overwhelming majority of the third party claims and which are the parties seeking prime benefits in this litigation, were required by the literal terms of Ill. Rev. Stat. 1971, chap. 110, § 22(3), on defendant's motion, to be identified as nominal parties in the pleadings (See A. 31-36). Also, there were errors

committed by the trial court in instructing the jury (See A. 134-36), and in failing to inquire of the jury as to whether it had been exposed to an inflammatory and prejudicial newspaper article which appeared in the *Peoria Journal Star*, the area's only newspaper of general circulation, during the trial (See A. 140-41).

All of the foregoing points are set forth in defendant's post-trial motion (A. 115-145), as well as in defendant's briefs in the appellate court. Defendant continues to rely upon these contentions, and should this Court allow the plaintiff's petition for leave to appeal, they will be briefed for the Court's consideration.

CONCLUSION

In this case the trial court allowed a jury to find defendant strictly liable in tort and guilty of negligence as respects plaintiff railroad solely as a result of defendant's following, not violating, the AAR Interchange Rules, rules upon which plaintiff had an opportunity to vote, rules which plaintiff's owners helped promulgate, and rules to which plaintiff had agreed in writing. The appellate court reversed that determination unanimously, correctly viewing this case as litigation beyond the limits of strict liability and negligence. If this Court denies plaintiff's petition for review, as defendant urges, that ruling will succinctly and properly endorse the elemental common sense of the appellate court's decision.

Respectfully submitted,

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APPENDIX 2

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ILLINOIS
SPRINGFIELD
62706

June 7, 1979

Lord, Bissell & Brook
Attorneys at Law
115 South LaSalle Street
Chicago, Illinois 60603

In re: Toledo, Peoria & Western Railroad, a corporation, petitioner, vs. Burlington Northern, Inc., a corp., respondent. No. 51806

Gentlemen:

Pursuant to Current Rule 317, when both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order.

We are therefore returning your motions by petitioner for a ruling on the petition for appeal as a matter of right and for stay of mandate pending such ruling received in this office today.

Very truly yours,

Clerk of the Supreme Court

CLW:gn
cc—Davis & Morgan
Theodore G. Schuster